Supreme Court, U.S.
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No. ——

In The
Supreme Court of the United States

JACOB J. FAUST,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the exigent circumstances exception to the Fourth Amendment permits an officer to conduct a nonconsensual warrantless search and seizure of blood when a voluntary, valid chemical breath test over the legal limit has already been obtained.

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PETITION FOR A WRIT OF CERTIORARI

Attorney Kirk Bowden Obear, on behalf of the Petitioner Jacob J. Faust, petitions for a writ of certiorari to review the judgment of the Supreme Court of Wisconsin in this case.

OPINION BELOW

The opinion of the Supreme Court of Wisconsin is found at *State of Wisconsin v. Faust*, 2004 WI 99, 682 N.W.2d 371 (July 2, 2004). The opinion is reproduced at Appendix A.

JURISDICTION

The opinion of Supreme Court of Wisconsin, reversing the Court of Appeals decision below, was entered

on July 2, 2004. The Supreme Court of Wisconsin is the court of last resort in the State of Wisconsin. The question of whether the exigent circumstances exception to the Fourth Amendment permits an officer to conduct a nonconsensual warrantless search and seizure of blood when a voluntary, valid chemical breath test over the legal limit has already been obtained was presented to the Supreme Court of Wisconsin and decided on the merits. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provision involved is:

UNITED STATES CONSTITUTION, AMENDMENT IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The relevant statutory provisions are set forth in an appendix to the petition. Appendix C.

STATEMENT OF THE CASE

In the circuit court[1] for Sheboygan County, the petitioner filed a motion to suppress the result of the blood test taken without his consent, arguing that since a voluntary

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[1] The court of original jurisdiction in Wisconsin is the Circuit Court. There is a Circuit Court in each of the 72 counties within the state.

breath test had already established that his alcohol concentration exceeded the legal limit, there was no longer any exigency justifying a blood draw without a warrant, thus violating the Fourth Amendment to the United States Constitution, as well as article 1, section 11 of the Wisconsin Constitution[2]. The circuit court granted the petitioner's motion and the State appealed the decision to the Wisconsin Court of Appeals. That court affirmed the circuit court's ruling and the State again appealed to the Supreme Court of Wisconsin. A divided Supreme Court reversed the decision of the Court of Appeals, finding that the rapid dissipation of alcohol in the bloodstream of an individual arrested for a drunk driving related offense constitutes an exigency that justifies the warrantless nonconsensual test of that individual's blood, even if the police already have an valid breath test establishing the suspect's alcohol concentration over the legal limit. The case has not yet been tried in Sheboygan County Circuit Court as the parties were willing to proceed with the appellate process on this issue prior to resolution or trial of the case. The trial has been suspended pending the outcome of petitioner's appellate challenge.

1. The underlying facts

The facts below were undisputed. On February 19, 2002, Sheboygan police officer James Olsen conducted a traffic stop in the City of Sheboygan, Wisconsin. Prior to the stop, the officer had observed that the license plate displayed on the car petitioner was driving was registered to a different type of vehicle than that which was observed. When the officer pulled the vehicle over and identified the petitioner, he noted a strong odor of intoxicants coming from the

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[2] The Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution are virtually identical and both establish the right of persons to be free from unreasonable searches and seizures. *See, State v. Krajewski*, 2002 WI 97, ¶18, n9, 255 Wis. 2d 98, 648 N.W.2d 385 (2002).

vehicle and noted that Faust's speech was slurred. Officer Olsen also observed that Faust's eyes were bloodshot and glassy. Faust admitted to having consumed five brandies and the officer administered several field sobriety tests, which Faust apparently did not pass satisfactorily. Officer Olsen then administered a preliminary breath test which returned a result of .13 g/100 ml of blood alcohol content.

Officer Olsen then transported Faust to the Sheboygan police department, where he agreed to provide a sample of his breath for chemical analysis. The breath test revealed that Faust's alcohol concentration was .09 grams of alcohol per 210 liters of breath, which is over the legal limit in this case. Wisconsin law establishes the prohibited alcohol concentration of .08 grams of alcohol per 210 liters of breath in this case. WIS. STAT. § 885.235(1)(g)(cd) (2001-02) (Appendix C). Officer Olsen believed that the test was accurate and valid.

At this point in the process, Officer Olsen was aware that Faust had a prohibited alcohol concentration, since his breath test result was over the legal limit. In spite of this fact, the officer requested an additional test of Faust's blood, which Faust refused to consent to. The officer did not "need" this test, but simply "desired" it. *See, State v. Faust*, 2004 WI 99 at ¶65, (Prosser, J., dissenting). Appendix A, pg. 35a. The officer then proceeded to obtain a forced blood draw from Faust which yielded a blood alcohol concentration of .10 g/100 ml of blood.

2. The circuit court proceedings

On October 16, 2002, Faust filed a motion to suppress the blood test results, arguing that since the breath test had already established that he had a prohibited alcohol concentration, there was no longer any exigency that justified a nonconsensual warrantless blood draw. The

circuit court agreed with Faust, reasoning that exigent circumstances did not exist to justify the warrantless taking of Faust's blood. The State appealed this decision.

3. The Court of Appeals of Wisconsin decision

October 1, 2003, the Wisconsin Court of Appeals issued a published decision affirming the ruling of the circuit court. *State v. Faust*, 2003 WI App 243, 267 Wis. 2d 783, 672 N.W.2d 97 (Ct. App. 2003). Appendix B, pg 37a. The Court of Appeals found that once an individual arrested on probable cause for an alcohol related offense has provided a satisfactory and usable chemical test, the exigent circumstances justifying a warrantless and nonconsensual blood draw no longer exist.

The Court of Appeals relied upon a decision of the Wisconsin Supreme Court, *State v. Krajewski*, 2002 WI 97, 255 Wis.2d 98 (2002), *cert denied*, 537 U.S. 1089 (2002), which held that "the exigency that exists because of dissipating alcohol does not disappear until a satisfactory, useable chemical test has been taken." *Id.* at ¶40. The Court of Appeals characterized this holding as a "clear directive from the state Supreme Court." *Faust,* 2003 WI App 243, ¶13. (See, Appendix B, pg 42a). Again, the State appealed this decision.

4. The Supreme Court of Wisconsin decision

a. The majority opinion. On July 2, 2004, a divided Supreme Court of Wisconsin issued a published decision reversing the holding of the Court of Appeals for Wisconsin. *State of Wisconsin v. Faust*, 2004 WI 99, 682 N.W.2d 371 (July 2, 2004). The majority opinion didn't agree that the directive in *Krajewski, supra*, was quite as clear as the Court of Appeals had stated. The Supreme Court of Wisconsin held that the presence of one presumptively

valid chemical sample of a defendant's breath does not extinguish the exigent circumstances justifying a warrantless blood draw. *Faust,* 2004 WI 99, at ¶3. (See, Appendix A, pg 2a-3a). Further, the court went on to hold that the nature of the evidence sought (the rapid dissipation of alcohol from the bloodstream), not the existence of other evidence, determines the exigency. *Id.* ¶3 (See, Appendix A, pg 2a-3a).

The majority opinion cited this Court's decision in *Schmerber v. California*, 384 U.S. 757 (1966), for the general principle that a "compelled intrusion into the body for blood to be analyzed for alcohol content constitutes a search under the Fourth Amendment." *Faust*, 2004 WI 99, at ¶10. Appendix A, pg. 7a. The majority continued its reliance on *Schmerber* by observing that:

> ... the United States Supreme Court established that the rapid metabolization and dissipation of alcohol from the bloodstream of an individual arrested for a drunk driving related offense qualifies as an exigent circumstance justifying the attempt to secure evidence of intoxication without first securing a warrant.

Faust, 2004 WI 99, at ¶12, Appendix A, pg 7a-8a, citing *Schmerber* at 770-71. This is the oft quoted language from *Schmerber* establishing that the exigent circumstances exception applies to drunk driving cases. However, the majority opinion cited no other significant United States Supreme Court precedent in its landmark determination that the exigency inquiry is limited only to the nature of the evidence being sought. Thus, the Wisconsin Supreme Court decision stands for the proposition that even when the object of the search is completed and the evidence is successfully seized, the nature of the exigency warrants continued

searches and seizures until the officer decides, on his own, that the exigency has sufficiently dissipated.

The majority made passing reference to *United States v. Reid*, 929 F.2d 990 (4th Cir. 1991), and summarized the holding parenthetically as "upholding multiple breath tests of one defendant under the exigent circumstances doctrine." *Faust*, 2004 WI 99, at footnote 9. Appendix A, p 13a. This is not the holding of *Reid* at all. The issue of whether the exigency dissipates after the submission of one test over the legal limit was not raised or addressed in the *Reid* case. The Fourth Circuit merely concluded that the exigent circumstances exception applied to breath tests, consistent with *Schmerber*'s treatment of blood tests, in general. There was no discussion whatsoever in *Reid* regarding an ongoing exigency after the suspect has voluntarily submitted to a test. Further, both defendants in *Reid* did, in fact, voluntarily submit to the tests in question. Therefore, the *Reid* case is inapplicable since this case involves a warrantless nonconsensual forced blood draw, not a voluntary test. The Wisconsin Supreme Court's reliance on the *Reid* decision is misplaced.

It should also be noted that the Supreme Court of Wisconsin justified the decision with a variety of "what if" scenarios that were either not present in this case, or represent speculation that cannot be logically contained to the extent that the decision provides vague guidance to officers in the field. For example, the decision cites the possibility that "the test may be subject to challenge on grounds that the person's consent to the test was not given freely and voluntarily." *Faust*, 2004 WI 99, at ¶20. Appendix A, pg 11a. However, the court does not explain how such a concern translates into the "emergency" contemplated by *Schmerber*. *See, Schmerber* at 770. Indeed, it does not. Speculation as to future defense challenges is unrelated to exigency and cannot be logically

applied in a uniform manner. To do so would result in an exigency existing in every case.

b. The dissent. Three of the justices in the Wisconsin Supreme Court dissented from the majority opinion, in two dissenting opinions. Chief Justice Abrahamson believed that exigent circumstances did not exist because the arresting officer had already obtained what he believed to be a voluntary and sufficient breath test that demonstrated Faust's alcohol concentration was in excess of the legal limit. *Faust*, 2004 WI at ¶36. Appendix A, pg. 24a. She went on to state that "the crux of the Fourth Amendment is reasonableness" and that the majority opinion "erroneously holds that the nature of the evidence alone determines whether exigency exists." *Faust*, 2004 WI at ¶ 40, 42. Appendix A, pg. 25a-26a.

The Chief Justice justified her rationale by pointing out that evidence of alcohol in the body is destroyed by the passage of time without any act of the individual involved and that "all evidence of intoxication cannot be gathered and preserved." *Faust*, 2004 WI at ¶44. Appendix A, pg 26a-27a. Indeed, it would appear from the majority opinion that the exigent circumstances exception should serve as a means to gather cumulative evidence beyond the bounds of reasonableness. The Chief Justice stated that "evidence of intoxication that is being destroyed in the present case is cumulative of other evidence already collected and preserved." *Faust*, 2004 WI at ¶44. Appendix A, pg. 29a.

This dissenting opinion also criticized the majority for permitting law enforcement to compel the seizure of blood as many times as the officer feels is necessary without setting any limit on the reasonableness of such an ongoing exigency. She stated:

> The majority's argument is essentially that because the law enforcement officers do not know what will happen at trial (an no one does, of course), it was reasonable for them to take as many valid tests of the suspect's blood alcohol as they thought necessary to sustain a conviction.

Faust, 2004 WI at ¶45, Appendix A, pg. 27a. According to Chief Justice Abrahamson, the majority conceded that law enforcement cannot have carte blanche to take an unlimited number of tests as long as alcohol continues to dissipate, but the majority "refuses to define the outer limits of how many tests are reasonable." *Faust*, 2004 WI at ¶48. Appendix A, pg. 28-29a.

Justice Prosser authored his own dissent, arguing that the majority redefines "exigency" to the point that it becomes meaningless. *Faust*, 2004 WI at ¶56. Appendix A, pg. 30a. It is a rare occasion that a supreme court justice pulls out the dictionary to make a point, but it happened in this case because of the elementary flaw in the logic of the majority opinion. Justice Prosser cited the American Heritage Dictionary of the English Language and its definition of "exigent." It means "requiring immediate action or remedy," or a "pressing or urgent situation." *Faust*, 2004 WI at ¶57, Appendix A, pg. 31a, citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 642 (3d ed. 1992). Exigencies are "urgent requirements, pressing needs." *Id.*

Justice Prosser then goes on to do what the majority did not do - he summarized holdings of the United States Supreme Court on the issue of exigency, each of which supported Justice Prosser's conclusion that a second search cannot be justified as an "urgent requirement." Pointing to the case law that preceded *Schmerber*, Justice Prosser cites

McDonald v. United States, 335 U.S. 451 (1948), wherein this Court suppressed evidence obtained when police intruded into the home of a suspected "numbers" operator. In that case, Justice Douglas reflected on the importance of the Fourth Amendment:

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some ***grave emergency***, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

Faust, 2004 WI at ¶59. Appendix A, pg. 31a-32a, quoting *McDonald*, 335 U.S. at 455-56, (emphasis added). Justice Prosser then emphasized the language in *Johnson v. United States*, 333 U.S. 10 (1948), wherein this Court stated that exceptional circumstances did not exist in that case because "no evidence or contraband was threatened with

removal or destruction." *Faust*, 2004 WI at ¶ 59, Appendix A, pg. 32a, quoting *Johnson*, 333 U.S. at 14-15. Justice Prosser concludes that the police had obtained satisfactory, usable evidence and that nothing threatened the destruction of that evidence - the only thing "threatened," as Justice Prosser put it, was "the destruction of additional evidence of the same character." *Faust*, 2004 WI at ¶63, Appendix A, pg. 34a. He believed that the exigent circumstances exception as envisioned by this Court's precedent, did not justify the warrantless nonconsensual search of Faust's blood.

REASONS FOR GRANTING THE PETITION

This Court will consider review on certiorari if a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. SUP. CT. RULE 10(b). This Court will also consider review on certiorari if a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with the relevant decisions of this Court. SUP. CT. RULE 10(c). Petitioner asserts that the decision below meets the criteria set forth in both rule 10(b) and rule 10(c), as explained herein.

A. The decision below conflicts with the Ninth Circuit's decision in *Nelson v. City of Irvine*.

1. The *Nelson* case compared to *Faust*. The decision of the Wisconsin Supreme Court is at odds with the United States Court of Appeals for the Ninth Circuit's decision in *Nelson v. City of Irvine,* 143 F.3d 1196 (9th Cir 1998), *cert denied* 525 U.S. 981 (1998). That case held:

> When an arrestee requests but is denied the choice of an available breath or urine test, the exigency used to justify the warrantless blood test continues only because of the City's failure to perform the requested alternative test. Whenever a DUI arrestee consents to a breath or urine test, and such tests are available, the administration of either the breath or urine test would preserve the evidence and end the exigency. In such cases, because the sole justification advanced to excuse the officers from obtaining a warrant disappeared when the exigency ended, the blood tests were not only unnecessary and unreasonable, but violated the Fourth Amendment's warrant requirement.

Id. at 1205. In *Nelson*, the Ninth Circuit dealt with a situation where the suspect was *willing* to submit to a breath test in lieu of a blood test. According to Nelson, the mere indication that a suspect is willing to provide a chemical sample by an authorized means other than blood is sufficient to extinguish the exigency to obtain blood. Here, Faust not only indicated this willingness, but the police actually *obtained* the breath test result - an even stronger argument that the exigency is gone. It is hard to square *Faust* with *Nelson.*

To pass constitutional muster under the Fourth Amendment a search must be reasonable. *Ohio v. Robinette,* 519 U.S. 33, 117 S. Ct. 417, 421, 136 L. Ed. 2d 347 (1996). Generally, a search must also be supported by probable cause, and must be backed up by a warrant, or the circumstances must fit an exception to the warrant requirement. *Winston v. Lee,* 470 U.S. 753, 759-61, 84 L. Ed. 2d 662, 105 S. Ct. 1611 (1985).

In *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966), the Supreme Court held that blood extraction from an arrestee who had refused a breath test is reasonable. However, the Court expressly reserved the question whether the government could take blood when other tests were available or requested:

> Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the "Breathalyzer" test petitioner refused. . . . We need not decide whether such wishes would have to be respected.

Id. at 771. This Court also emphasized in *Schmerber* that its holding "in no way indicates that [the Constitution] permits more substantial intrusions, or intrusions under other conditions." *Id.* at 772. Thus, *Schmerber* did not reach the issue of whether it violates the Fourth Amendment's reasonableness command to require an arrestee, who has expressed a preference for, or consented to, an available breath or urine test, to submit to a blood test. Likewise, *Schmerber* did not reach the issue of whether it violates the Fourth Amendment's reasonableness command to compel a blood test when the police have another form of the same evidence in hand.

In *Winston v. Lee, supra*, this Court held that it violated the Fourth Amendment to forcibly remove a bullet having evidentiary value from the chest of a robbery suspect. The Court clarified and applied the *Schmerber* balancing test as "the appropriate framework of analysis," noting that "the question whether the community's need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers." 470 U.S. at 760.

An interesting component of this scenario which was not present in *Nelson* is that the "evanescent" evidence sought to be seized is actually less relevant than the evidence already obtained. Once a valid sample is taken from the suspect, the exigency of obtaining additional evidence at a point in time further removed from the act of driving (which is the point in time that the crime is committed) becomes less exigent. It is not "the best evidence" if a breath sample has already been taken. It is difficult to see how the exigency remains after one test has already proven the point.

2. In both *Nelson* and *Faust*, blood has the equivalent evidentiary value as breath. As stated in Nelson,

> California law provides that the amount of alcohol in a person's blood may be shown by chemical analysis of that person's blood, breath, or urine, *Cal. Veh. Code § 23155(a)*, and criminalizes "driving either with the specified blood-alcohol level or with the specified breath-alcohol level." *People v. Bransford, 8 Cal. 4th 885, 890, 884 P.2d 70 (1994)*. Thus, in California, breath and urine tests are equally effective as a blood test in determining whether a suspect has violated the DUI law. *People v. Fiscalini, 228 Cal. App. 3d 1639, 279 Cal. Rptr. 682, 686 (Ct. App. 1991)*.

Nelson v. City of Irvine, 143 F.3d at 1201. Much like California, Wisconsin treats the results of breath, blood and urine tests as equivalent forms of chemical evidentiary analysis. According to § 885.235 of the Wisconsin Statutes:

> In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration while operating or driving a motor vehicle ... evidence of the amount of alcohol in the persons blood at the time in question, as shown by chemical analysis of a sample of the persons blood or urine or evidence of the amount of alcohol in the persons breath, is admissible on the issue of whether he or she was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration if the sample was taken within 3 hours after the event to be proved.

WIS STAT 885.235(1g)(2001-02) (Appendix C, pg 50a-51a). Thus, it is clear from the statute that obtaining a blood sample has precisely the same evidentiary effect as obtaining a breath sample. The statutes do not recognize blood as a superior method of analysis over breath - they are treated exactly the same. Thus, the same rationale applied in *Nelson* should logically apply in this case.

B. The decision below represents an important federal question that has not been, but should be, settled by this court.

The Faust decision represents a watershed that has the potential to extend the exigent circumstances exception far beyond that originally contemplated by *Schmerber*. Police officers, following the logic of *Faust*, will have unfettered discretion to conduct an infinite number of searches based upon the mere assertion that they believe the nature of the evidence sought constitutes an exigency. There is now no rule in Wisconsin that sets any limit of

reasonableness on such searches. The *Faust* decision does not draw any distinction between two tests of the defendant's alcohol concentration versus twenty. Even in the case of an individual who consents to additional tests, there is the risk of police abusing a procedure when at some point, it is logical to assume that a suspect will have "had enough" and will stop consenting to repeated blood draws, thereby bringing about a refusal charge in addition to the drunk driving charge.

Chief Justice Abrahamson put it best in her dissenting opinion in *Faust*:

> By failing to define the outer limits of what is reasonable in a blood draw case, the majority opinion opens the door to more litigation. The majority opinion also leaves law enforcement officers, litigants, circuit courts, and the court of appeals in a quandary, without guidance regarding what number of tests is reasonable.

Faust, 2004 WI at ¶50, Appendix A, pg. 29a. Justice Prosser set forth additional factors which illustrate the importance of this case:

> ... it would seem as though an exigency exists in every case in which blood is not drawn. Such an exigency is a built in rationale for extended detention and additional tests potentially amounting to harassment.

Faust, 2004 WI at ¶65, Appendix A, pg. 35a.

This Court has not decided a drunk driving case implicating exigent circumstances since *Schmerber*. The

country is in need of definitive and uniform guidance on this issue which can only be provided by this Court.

C. The decision below conflicts with the relevant decisions of this court.

The decision below has expanded the exigent circumstances exception beyond the limits defined by this Court. The holding announced in *Schmerber* is not boundless. This Court has consistently viewed the exigent circumstances exception in such a way as to require a showing of imminency or emergency on a case-applied basis. In Wisconsin, we now have a rule under *Faust* which categorically regards all searches of blood as exigencies. This Court has never issued a holding as broad in application as the *Faust* case suggests the Fourth Amendment permits. This Court has carefully applied the exception to specific facts.

For example, in *Cupp v. Murphy*, 412 U.S. 291 (1973), the Court found that exigent circumstances justified the warrantless search of fingernails for skin, blood cells, and fabric because police feared the destruction of evidence in that case. The suspect had a motive and the ability to destroy the evidence and under the specific facts presented to the Court, the exigency was justified. However, the holding did not result in a rule that gives carte blanche to law enforcement to treat all fingernail searches as exigent by the *nature* of the evidence.

Likewise, the Court found exigent circumstances in *Warden v. Hayden*, 387 U.S. 294 (1967), where police made a warrantless entry into a home for an armed robbery suspect because any delay would endanger the lives of officers and citizens. As duly pointed out by the majority in *Faust*, drunk driving is a serious problem in our country. However, it cannot be said that public safety is any more at risk by

adhering to the reasonableness standard when a satisfactory, valid sample is already in the possession of the police. Seizing an additional, cumulative test does no more to protect the safety of citizens than the voluntary test did. He was arrested for drunk driving and remained in police custody whether he consented to the test or not.

In *Ker v. California*, 374 U.S. 23 (1963), the Court found that exigent circumstances justified the warrantless search of an apartment for drugs, but only because the police feared the imminent destruction of the drugs. Again, the Court did not render a decision which treats all drug cases categorically as exigent circumstances cases. The holding was specific to the facts of the case. In *United States v. Santana*, 427 US 38 (1976), the Court found that a warrantless search was justified because the suspect was chased from the doorway of a home into the vestibule. Again, the police had to act quickly to seize the evidence they felt was literally running away from them.

Significantly, the Court found in *Welsh v. Wisconsin*, 466 US 740 (1984), that exigent circumstances did not justify a warrantless entry into a suspects home on suspicion of a drunk driving offense. If the rationale in *Faust* is the correct one, this Court could easily have found that exigent circumstances existed to obtain blood from Mr. Welsh simply because he had blood in his body and any alcohol present in the blood was dissipating. Although the issue in Welsh dealt with entry into a private home, it would appear that if the Court had wanted to extend *Schmerber* to treat all drunk driving case as exigency cases, it could have done so.

The *Faust* decision is incongruous with precedent of this Court. This most recent step in the evolution of Wisconsin's view of the Fourth Amendment has strayed far away from the original course laid out by *Schmerber*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX C:

WIS. STAT. § 885.235 (2002) 50a

State of Wisconsin, Plaintiff-Appellant-Petitioner, v. Jacob J. Faust, Defendant-Respondent.

No. 03-0952-CR

SUPREME COURT OF WISCONSIN

2004 WI 99; 682 N.W.2d 371; 2004 Wisc. LEXIS 474

April 6, 2004, Oral Argument
July 2, 2004, Opinion Filed
[ENTERED: July 2, 2004]

PRIOR HISTORY: **[***1]** *REVIEW OF A DECISION OF THE COURT OF APPEALS. 2003 WI App 243* Reported at: *267 Wis. 2d 783, 672 N.W.2d 97, 2003 WI App 243 (Ct. App. 2003-Published).* Source of Appeal: Court: Circuit. County: Sheboygan. Judge: Gary Langhoff. L.C. No. 02CT145.

State v. Faust, 267 Wis. 2d 783, 672 N.W.2d 97, 2003 WI App 243, 2003 Wisc. App. LEXIS 927 (2003).

DISPOSITION: Decision of Court of Appeals reversed.

COUNSEL: For the plaintiff-appellant-petitioner the cause was argued by Mary T. Wagner and Joseph DeCecco, with whom on the brief was Peggy A. Lautenschlager, attorney general.

For the defendant-respondent there was a brief by Stephen M. Seymour, Sheboygan, and oral argument by Stephen M. Seymour.

JUDGES: JON P. WILCOX, J. ABRAHAMSON, C.J., dissents (opinion filed). BRADLEY and PROSSER, J.J., join dissent. PROSSER, J., dissents (opinion filed). ABRAHAMSON, C.J. and BRADLEY, J., join dissent.

OPINION BY: JON P. WILCOX

OPINION:

[373]** **[*P1]** JON P. WILCOX, J. The State appeals from a published court of appeals decision, *State v. Faust, 2003 WI App 243, 267 Wis. 2d 783, 672 N.W.2d 97,* **[***2]** which affirmed an order of the Sheboygan County Circuit Court, Gary J. Langhoff, Judge, granting the defendant's motion to suppress the results of a forced blood draw taken from him that indicated he was operating a motor vehicle with a prohibited alcohol concentration.

I. ISSUE

[*P2] The issue presented is whether, under the *Fourth Amendment to the United States Constitution* and *Article I, Section 11 of the Wisconsin Constitution*, exigent circumstances exist for a nonconsensual warrantless blood draw after the police have obtained what the arresting officer believes to be a voluntary, satisfactory, and useable chemical breath test indicating that the individual arrested was operating a motor vehicle with a prohibited level of alcohol concentration. n1

n1 We do not address whether exigent circumstances would exist if the first test indicates that the defendant's blood alcohol concentration is within the legal limits.

[*P3] For the reasons discussed below, we reaffirm that the rapid dissipation of **[***3]** alcohol in the bloodstream of an individual arrested for a drunk driving related offense

constitutes an exigency that justifies the warrantless nonconsensual test of that individual's blood, so long as the test satisfies the four factors enumerated in *State v. Bohling, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993)*. We hold that the presence of one presumptively valid chemical sample of the defendant's breath does not extinguish the exigent circumstances justifying a warrantless blood draw. The nature of the evidence sought--that is, the rapid dissipation of alcohol from the bloodstream--not the existence of other evidence, determines the exigency. Because exigent circumstances were present in this case and the blood test satisfied the test we set forth in Bohling, we reverse the decision of the court of appeals.

[374]** II. FACTUAL BACKGROUND

[*P4] The operative facts of this case are undisputed. On February 19, 2002, Officer James Olsen of the Sheboygan Police Department was on routine patrol and was inspecting the license plates of vehicles parked behind a local tavern. Upon checking the plates of a 1998 Chevrolet coupe, Officer Olsen discovered that the plates **[***4]** were registered to an Audi coupe. A short time thereafter, Officer Olsen observed the vehicle leave the parking lot. Officer Olsen initiated a routine traffic stop, and the driver of the vehicle, the defendant, identified himself as one Jacob J. Faust. Officer Olsen noticed a "strong odor of intoxicants" emanating from the vehicle and observed that Faust was slurring his speech and exhibited bloodshot, glassy eyes. Upon questioning, Faust indicated to Officer Olsen that he had consumed "five brandies" before driving.

[*P5] Officer Olsen thereafter administered a field sobriety test that Faust failed to successfully complete. Faust then voluntarily submitted to a preliminary breath test under *Wis. Stat. § 343.303* (2001-02), n2 the result of which indicated Faust possessed an alcohol concentration of 0.13. n3 Officer Olsen placed Faust under arrest and transported him to police headquarters. Upon arriving, Faust consented to provide

a sample of his breath for chemical analysis. The results of the breathalyzer indicated that Faust possessed an alcohol concentration of 0.09 grams of alcohol per 210 liters of breath. Officer Olsen then performed a search **[***5]** of Faust's criminal driving record, the result of which indicated that Faust had two prior convictions for operating a motor vehicle while intoxicated. As an individual with two or more prior convictions for operating a motorized vehicle while intoxicated, Faust was subject to the prohibited alcohol concentration of 0.08. *Wis. Stat. § 885.235(1g)(c-d).*

n2 *Section 343.303* states, in pertinent part, that "the result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305(3)."

All subsequent references to the Wisconsin Statutes are to the 2001-02 version unless otherwise indicated.

n3 "'Alcohol concentration' means the number of grams of alcohol in 100 milliliters of a person's blood or the number of grams of alcohol in 210 liters of a person's breath." *Wis. Stat. § 885.235(1)(a).*

[*6]**

[*P6] Officer Olsen then requested that Faust provide a blood sample. After Officer Olsen read Faust the Informing the Accused form, n4 Faust refused to submit to the blood test without giving any reason. Officer Olsen then issued a Notice of Intent to Revoke Faust's license for refusing the blood test. n5 Faust was transported to the hospital where, following routine procedures, a phlebotomist administered the blood test. The result from the blood test indicated that Faust possessed a blood alcohol concentration of 0.1 grams of alcohol per 100 milliliters of blood. Officer Olsen did not request a drug

analysis of Faust's blood sample. It is undisputed that Officer Olsen at no time sought a warrant for the blood test.

n4 See *Wis. Stat. § 343.305(4).*

n5 See *Wis. Stat. § 343.305(9)(a).*

III. PROCEDURAL POSTURE

[*P7] On March 7, 2002, the State filed a criminal complaint against Faust, alleging violations of *Wis. Stat. § 346.63(1)(a)* **[***7]** (operating while intoxicated) and *Wis. Stat. § 346.63(1)(b)* (operating with a prohibited alcohol concentration). On October 15, **[**375]** 2002, Faust filed a motion to suppress the results of the blood test, arguing that the warrantless test was taken in violation of the United States and Wisconsin Constitutions because exigent circumstances did not exist due to the fact that the arresting officer already had obtained what he believed to be a voluntary and sufficient breath test that indicated Faust's level of intoxication was in excess of the legal limit. At the motion hearing, Officer Olsen indicated that while it was not department procedure to request a blood test in all drunken driving cases, he sought a blood test for the purpose of gathering additional evidence because the previous two tests were very near the legal limit. Officer Olsen also testified that at the time the breathalyzer was administered, he believed it to be a voluntary and satisfactory test. The circuit court granted Faust's motion to suppress on February 25, 2003, concluding that "exigent circumstances did not exist to justify the warrantless taking of the Defendants blood."

[*P8] The court **[***8]** of appeals, based on our decision in *State v. Krajewski, 2002 WI 97, 255 Wis. 2d 98, 648 N.W.2d 385*, affirmed the order of the circuit court. *Faust, 2003 WI App 243, 267 Wis. 2d 783, 672 N.W.2d 97*, In Krajewski, this court held:

> a warrantless nonconsensual blood draw from a person arrested on probable cause for a drunk driving offense is constitutional based on the exigent circumstances exception to the warrant requirement of the *Fourth Amendment*, even if the person offers to submit to a chemical test other than the blood test chosen by law enforcement, provided that the blood draw complies with the factors enumerated in Bohling.

Krajewski, 2002 WI 97, 255 Wis. 2d 98, P3, 648 N.W.2d 385. However, we also stated in Krajewski that "the exigency that exists because of dissipating alcohol does not disappear until a satisfactory, useable chemical test has been taken." *Id., P40*. The court of appeals concluded that this sentence from Krajewski compelled the conclusion that "once an individual arrested on probable cause for OWI has provided a satisfactory and useable chemical test, the exigent circumstances justifying a warrantless and **[***9]** nonconsensual blood draw no longer exist." *Faust, 2003 WI App 243, 267 Wis. 2d 783*, In a concurring opinion, Judge Neal P. Nettesheim stated that although he felt bound by this sentence from Krajewski, the remainder of the analysis in Krajewski contradicted this isolated passage. *Faust, 2003 WI App 243, 267 Wis. 2d 783, PP18-21* (Nettesheim, J. concurring).

IV. STANDARD OF REVIEW

[*P9] There are no genuine issues of material fact for the purposes of this appeal. Whether a nonconsensual warrantless blood draw taken to obtain evidence of a driver's blood alcohol concentration following an arrest falls within the exigent circumstances exception to the warrant requirement of the state and federal constitutions is a question of law that this court reviews de novo. *Krajewski, 2002 WI 97, 255 Wis. 2d 98, P17, 648 N.W.2d 385*.

V. ANALYSIS

A. Exigent Circumstances

[*P10] We begin our analysis by reiterating some basic constitutional principles applicable to the case at bar. Both *Article I, Section 11 of the Wisconsin Constitution* and the *Fourth Amendment of the United States Constitution* "guarantee citizens the right to be free from "'unreasonable **[***10]** searches.'" *Bohling, 173 Wis. 2d at 536.* **[**376]** n6 A "compelled intrusion[] into the body for blood to be analyzed for alcohol content" constitutes a search under the *Fourth Amendment. Schmerber v. California, 384 U.S. 757, 767-68, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966).*

> n6 "The *Fourth Amendment to the United States Constitution* and *Article I, Section 11 of the Wisconsin Constitution* are virtually identical. Both establish the right of persons to be secure from unreasonable searches and seizures. Consequently, this court interprets the two constitutional provisions in concert." *State v. Krajewski, 2002 WI 97, P18 n.9, 255 Wis. 2d 98, 648 N.W.2d 385.*

[*P11] Subject to a few well-delineated exceptions, warrantless searches are deemed per se unreasonable under the *Fourth Amendment. Bohling, 173 Wis. 2d at 536* (quoting *State v. Murdock, 155 Wis. 2d 217, 227, 455 N.W.2d 618 (1990)).* It is clear that "[a] governmental search based on 'exigent **[***11]** circumstances,' like a search incident to an arrest, is a well-established exception to the warrant requirement." *Id. at 537.* Exigent circumstances are present so as to justify a search in the absence of a warrant where there is a threat that "evidence will be lost or destroyed if time is taken to obtain a warrant." *Id. at 537-38.*

[*P12] The test for whether exigent circumstances are present is an objective one, *id. at 538*, and inquires into whether the officer "might reasonably have believed that he

was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence[.]'" *Schmerber, 384 U.S. at 770* (quoting *Preston v. United States, 376 U.S. 364, 367, 11 L. Ed. 2d 777, 84 S. Ct. 881 (1964)).* In Schmerber, the United States Supreme Court established that the rapid metabolization and dissipation of alcohol from the bloodstream of an individual arrested for a drunk driving related offense qualifies as an exigent circumstance justifying the attempt to secure evidence of intoxication without first securing a warrant. *Id. at 770-71.*

[*P13] Faust asks us to **[***12]** conclude that once the police have obtained what they believe at the time to be a voluntary, satisfactory, and useable chemical sample of the level of the defendant's intoxication, the exigency supporting a warrantless blood draw disappears. Faust's argument relies primarily upon one sentence from our decision in Krajewski, where we stated that "the exigency that exists because of dissipating alcohol does not disappear until a satisfactory, useable chemical test has been taken." *Krajewski, 2002 WI 97, 255 Wis. 2d 98, P40, 648 N.W.2d 385.*

[*P14] In contrast, the State argues that the exigent circumstances exception to the warrant requirement of the *Fourth Amendment* is premised on the danger that evidence will be destroyed rather than whether the police already possess evidence of a criminal violation. The State contends that simply because the police already have collected what they believe to be a valid chemical sample establishing the defendant's level of intoxication does not remove the exigency. In other words, the State asserts that the circumstances giving rise to the exigency in the first instance--the rapid dissipation of alcohol from the bloodstream--are still present, **[***13]** regardless of whether the police have other evidence of intoxication.

[*P15] We agree with the State and Judge Nettesheim's concurrence that to read the isolated passage from Krajewski upon which Faust relies as providing that exigent **[**377]**

circumstances cease to exist in all cases when the police have already obtained a supposedly valid chemical test would be inconsistent with the nature of the exigency as illustrated in *Bohling* and *Krajewski*.

[*P16] In Bohling, this court explained that Schmerber could be interpreted in one of two ways:

> (a) that the rapid dissipation of alcohol in the bloodstream alone constitutes a sufficient exigency for a warrantless blood draw to obtain evidence of intoxication following a lawful arrest for a drunk driving related violation or crime--as opposed to taking a blood sample for other reasons, such as to determine blood type; or (b) that the rapid dissipation of alcohol in the bloodstream, coupled with an accident, hospitalization, and the lapse of two hours until arrest, constitute exigent circumstances for such a blood draw.

Bohling, 173 Wis. 2d at 539. We determined that the more reasonable **[***14]** interpretation of Schmerber was the former one: that exigent circumstances exist "based solely on the fact that alcohol rapidly dissipates in the bloodstream." *Id. at 539*. n7 In other words, we determined in Bohling that Schmerber stands for the proposition that the fact that alcohol rapidly dissipates in the bloodstream justifies an officer's belief that he is faced with "an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatens 'the destruction of evidence[.]'" *Schmerber, 384 U.S. at 770* (citation omitted).

> N7 Chief Justice Abrahamson's dissent contends that the State was required to offer additional evidence of exigent circumstances. Chief Justice Abrahamson's dissent, P44. This suggestion is clearly at odds with our

decision in *State v. Bohling, 173 Wis. 2d 529, 539, 494 N.W.2d 399 (1993)* (stating that exigent circumstances exist "based solely on the fact that alcohol rapidly dissipates in the bloodstream") (emphasis added).

[*15]**

[*P17] In addition, we noted that the United States Supreme Court has recognized that "in the context of a warrantless blood draw, . . . the *Fourth Amendment* warrant requirement is relaxed when the activity at issue constitutes a serious risk to public safety. Because of the public safety risk, persons engaging in such activities have a reduced expectation of privacy." *Bohling, 173 Wis. 2d at 540* (citing *Skinner v. Ry. Labor Executives Ass'n, 489 U.S. 602, 627, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989)).* We went on to explain the serious public safety concerns involved when a driver chooses to drive under the influence and that such concerns reduce a driver's expectation of privacy. *Id. at 541.* n8 We explained that our interpretation of Schmerber "strikes a favorable balance between an individual's right to be free from unreasonable searches and Wisconsin's interest in enforcing its drunk driving laws. Wisconsin's interest is vital whereas the resulting intrusion on individual privacy is minimal." *Id. at 545.*

n8 "No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion." *Michigan State Police Dept. v. Sitz, 496 U.S. 444, 451, 110 L. Ed. 2d 412 (1990).* More than one-third of all fatal traffic crashes in the state of Wisconsin involve alcohol. http://www.dot.state.wi.us/safety/motorist/drunkdriving/index.htm (last modified September 29, 2003).

[*16]**

[*P18] Therefore, we concluded that exigent circumstances exist based solely on the rapid dissipation of alcohol from a person's bloodstream, such that a warrantless **[**378]** blood sample could lawfully be taken under the following circumstances:

> (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw.

Bohling, 173 Wis. 2d at 533-34.

[*P19] In Krajewski, we determined that the exigency justifying a warrantless blood draw--the fact that evidence is likely to be destroyed--does not disappear "as soon as a person agrees to submit to a breath test as opposed to a blood test." *Krajewski, 2002 WI 97, 255 Wis. 2d 98, P36, 648 N.W.2d 385.* Focusing on the destructibility of the evidence, we reasoned that "the exigency upon which a warrantless blood draw is premised is the dissipation of alcohol in the **[***17]** blood stream. An arrested person's offer to submit to one chemical test rather than another does not slow this dissipation. The evidence remains on a course to be destroyed." *Id., P37* (emphasis added) (citations omitted).

[*P20] Further, we noted that "even when a person submits to a breath **[**379]** test in lieu of a blood test--outside the provisions of the implied consent statute--the test may be subject to challenge on grounds that the person's consent to the test was not given freely and voluntarily." *Id., P41* (emphasis added). Ultimately, we reaffirmed the four-factor test set forth in Bohling and held that "a person's agreement to submit to a

test of the person's choice does not negate the exigency, nor render unconstitutional a nonconsensual test of the officer's choice." *Id. P63.* We concluded:

> The rapid dissipation of alcohol in the bloodstream creates an exigency that justifies a nonconsensual test of the blood, breath, or urine of a person arrested for driving while intoxicated or other similar drunk-driving related offenses, so long as the test is administered pursuant to the factors enumerated in Bohling.

Id. (emphasis added). **[***18]**

[*P21] The trouble with Faust's argument and both dissents is that they ignore the nature of the exigency that justifies a warrantless blood draw as described in *Bohling* and *Krajewski.* This court in Bohling and Krajewski clearly stated that the exigency justifying a warrantless blood draw is the rapid metabolization and dissipation of alcohol from the bloodstream. The reasoning of *Krajewski*--which focused on the rapid dissipation of alcohol from the blood stream--is inconsistent with the conclusion that the exigency disappears as soon as the police have obtained what they at the time believe to be a valid chemical breath sample.

[*P22] The fact that the police have obtained a presumably valid chemical sample of the defendant's breath indicating the defendant's level of intoxication does not change the fact that the alcohol continues to dissipate from the defendant's bloodstream. The evidence sought "remains on a course to be destroyed." *Krajewski, 2002 WI 97, 255 Wis. 2d 98, P37, 648 N.W.2d 385.* In Krajewski, we specifically rejected the contention that "the exigency exception to the warrant requirement . . . turns upon the means used for executing **[***19]** the search rather than the urgency involved in the steady dissipation of alcohol." *Id., P42* (emphasis in original). We also intimated that the exigency remained "even

when a person submits to a breath test in lieu of a blood test" because the suspect could later challenge the test on the grounds that he did not freely and voluntarily consent to the test. *Id., P41.*

[*P23] Thus, we conclude, based on the rationale of *Bohling* and Krajewski, that the presence of one presumptively valid chemical sample of the defendant's breath does not extinguish the exigent circumstances justifying a warrantless blood draw. "The relevant basis for exigency here is that evidence is likely to be destroyed." *Krajewski, 2002 WI 97, 255 Wis. 2d 98, P36, 648 N.W.2d 385.* Regardless of whether the police had obtained a breath sample from Faust, the evidence of intoxication revealed by the blood test was on a course towards destruction. The nature of the evidence sought, not the existence of other evidence, determines the exigency. We have found no authority that stands for the proposition that the police are limited to obtaining only a single piece of evidence under the exigent circumstances **[***20]** doctrine. n9

n9 Cf. *United States v. Reid, 929 F.2d 990, 991-94 (4th Cir. 1991)* (upholding multiple breath tests of one defendant under the exigent circumstances doctrine). Also, we note that the United States Supreme Court rejected a *Fourth Amendment* challenge to regulations promulgated by the Federal Railroad Administration that authorized railroads to collect both blood and urine samples from employees involved in railroad accidents. *Skinner v. Ry. Labor Executives Ass'n, 489 U.S. 602, 609-10, 624, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989).*

Although the case did not specifically involve an application of the exigent circumstances doctrine, in rejecting the contention that a warrant was necessary to render these tests reasonable under the *Fourth Amendment*, the Court noted that "alcohol and other drugs are eliminated from the bloodstream at a constant

rate, and blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible." *Id. at 623* (citations omitted). The Court stated that "the delay necessary to procure a warrant nevertheless may result in the destruction of valuable evidence." *Id.* The Court did not state or even imply that the need to gather the evidence or the danger of its destruction was extinguished once one of the tests was performed.

We discussed Skinner in *Bohling, 173 Wis. 2d at 539-41*, to support our conclusion that the exigency was based solely on the fact that alcohol rapidly dissipates from the bloodstream. See also *Reid, 929 F.2d at 993* ("In Skinner, the Supreme Court reiterated the notion that time is of the essence when there is a need to test alcohol in the body."). We find these more recent decisions, which address the warrant requirement in the context of gathering evidence of intoxication, to be more persuasive than the dated cases relied upon by Justice Prosser's dissent that do not concern the issue presented in this case. Justice Prosser's dissent, PP58-60.

[*21]**

[*P24] In addition to being consistent with the nature of the exigency as described in *Bohling* and *Krajewski*, our conclusion comports with the underlying objective test for determining whether exigent circumstances exist. As noted supra, the test for whether exigent circumstances are present is an objective one and inquires into whether the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence[.]'" *Schmerber, 384 U.S. at 770* (quoting *Preston, 376 U.S. at 367*). Here, despite the presence of one presumptively voluntary and valid breath test, Officer Olsen might have

reasonably believed that it was necessary to secure additional evidence of Faust's level of intoxication without a warrant in order to prevent needed evidence from being destroyed.

[*P25] First, we recognize the police do not know when they administer a breath test whether the result of that test is valid **[**380]** and useable. In his concurrence, Judge Nettesheim indicated that appellate courts routinely hear a stream of challenges **[***22]** involving breath tests. *Faust, 2003 WI App 243, 267 Wis. 2d 783, P23 n.3.* As Judge Nettesheim stated:

> My concern is that the police do not have a crystal ball in these situations, a proposition which the Krajewski decision seems to recognize. While the police here presumably believed that they had obtained a valid breath test, this does not guarantee, in the very words of Krajewski, a satisfactory and useable breath test. That determination would depend on a future ruling by the trial court in the event that Faust should challenge the breath test.

Id., P22 (emphasis in original). Indeed, at oral argument counsel for Faust indicated that he planned to challenge the accuracy of the chemical breath test, due to medication that Faust was allegedly taking at the time of arrest.

[*P26] Second, police often need to acquire additional, more definitive evidence of intoxication where the results of a chemical analysis of a breath sample are close to the legal limit. Here, the preliminary breath test indicated that Faust possessed an alcohol concentration of 0.13. Chemical analysis of the breath sample provided at police headquarters indicated **[***23]** an alcohol concentration of 0.09. While a search of Faust's criminal driving record indicated that he had two drunk driving related offenses and was thus subject to a prohibited alcohol content of 0.08, the police do not know in advance

whether any of these prior convictions will ultimately be admitted into court. See *Faust, 2003 WI App 243, 267 Wis. 2d 783, P23* (Nettesheim, J., concurring) (collecting cases where the defendant challenged alleged prior convictions). Had Faust ultimately successfully challenged one or both of his prior convictions--something the police had no way of knowing at the time the breath test was taken--the State would have had to prove that Faust operated his motor vehicle with an alcohol concentration of at least 0.1. See *Wis. Stat. § 885.235(1g)(c)*. However, preliminary breath tests are not admissible at trial to prove the defendant's level of intoxication; they are only admissible at the probable cause hearing. *Wis. Stat. § 343.303*. Thus, the State would have been left with the results of the breathalyzer, which indicated that Faust possessed an alcohol concentration of only 0.09. **[***24]**

[*P27] Third, even if the suspect has apparently complied with the implied consent statute and provided an initial chemical sample, there may later be an issue as to whether the defendant actually consented to take the test. *State v. Rydeski, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997)*("[A] verbal refusal is not required. The conduct of the accused may serve as the basis for a refusal."). Likewise, there is no guarantee that the defendant will not argue at trial that the police coerced his or her consent to a test through use of the implied consent law or failed to properly administer the warning in *Wis. Stat. § 343.305(4)*. n10 Also, if a suspect consents to a blood test outside the parameters of the implied consent statute, there may later be an issue as to whether his consent was freely given. *Krajewski, 2002 WI 97, 255 Wis. 2d 98, P41, 648 N.W.2d 385*. Therefore, the fact that the police had obtained a single presumptively valid breath sample from Faust did not remove the need to gather evidence of intoxication in light of "the urgency involved in the steady dissipation **[**381]** of alcohol." *Krajewski, 2002 WI 97, 255 Wis. 2d 98, P42, 648 N.W.2d 385*. **[***25]** n11 The threat remained that "evidence [would] be lost or destroyed if time [were] taken to obtain a warrant." *Bohling, 173 Wis. 2d at 538*.

n10 See, e.g., *State v. Piddington, 2001 WI 24, P1, 241 Wis. 2d 754, 623 N.W.2d 528; Village of Little Chute v. Walitalo, 2002 WI App 211, P8, 256 Wis. 2d 1032, 650 N.W.2d 891; County of Ozaukee v. Quelle, 198 Wis. 2d 269, 274, 280-84, 542 N.W.2d 196 (Ct. App. 1995).*

n11 Our opinion in Krajewski emphasized that "the exigency upon which a warrantless blood draw is premised is the dissipation of alcohol from the blood stream." *Krajewski, 2002 WI 97, 255 Wis. 2d 98, P37, 648 N.W.2d 385.* Also, we reiterated that "the relevant basis for exigency here is that evidence is likely to be destroyed." *Id., P36.* We emphasized "the urgency involved in the steady dissipation of alcohol." *Id., P42.* Also, we acknowledged that this court in Bohling had established that "the rapid dissipation of alcohol in the blood stream alone constitutes a sufficient exigency" and "rejected a requirement that an officer seek a search warrant in the period immediately following arrest." *Id., P32.* Thus, we do not understand how one of the dissents, written by the author of Krajewski, can accuse us of "focusing narrowly on the fact that alcohol is dissipating in the bloodstream." Justice Prosser's dissent, P57.

[*26]**

[*P28] Furthermore, we note the practical consequences that would ensue if we were to accept Faust's position that the exigency evaporates once the police have secured a single breath test that the officer believes to be voluntary and useable. First, as we explained in Krajewski, under Wisconsin's implied consent statute, *§ 343.305*, "[a] person who operates a motor vehicle in this state is deemed to have given consent to one or more tests of his or her blood, breath, or urine upon the request of a law enforcement officer if the person is arrested for a

drunk driving offense." *Krajewski, 2002 WI 97, 255 Wis. 2d 98, P19, 648 N.W.2d 385* (emphasis added). n12 If we were to accept Faust's position, then when an individual arrested for drunk driving consents to the initial breath test and refuses all subsequent tests, the police would be compelled to obtain a warrant to conduct any additional test. As a result, "the arrested person would dictate the terms of investigation, limiting the police to a single option for a blood test--a search warrant." *Id., P42.* n13

n12 *Wisconsin Stat. § 343.305(3)* provides, in pertinent part:

> (a) Upon arrest of a person for violation of s. 346.63(1) . . . a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified under sub. (2). Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample.

Notably, Justice Prosser's dissent fails to even mention *§ 343.305(3).* **[***27]**

n13 As we discussed in Krajewski,

> In enacting the implied consent statute, the legislature authorized a law enforcement officer to request his or her choice among these three chemical tests and to request more than one chemical test from a person arrested for a drunk driving offense. In the absence of compelling evidence otherwise, we must presume that the legislature had

> good reasons for giving law enforcement officers the right to choose among chemical tests. These reasons could include the fact that one test may be better able to detect the presence of controlled substances than another; one test may be more efficacious as evidence before a jury than another; one test may be less susceptible to attack in court than another; one test may be more readily available on any given occasion than another; and tests taken in a hospital permit observation of an intoxicated person by a medical professional before the person is taken to jail. These reasons are equally valid for chemical tests taken outside the implied consent statute.

Krajewski, 2002 WI 97, 255 Wis. 2d 98, P55, 648 N.W.2d 385 (emphasis added).

[*28]**

[*P29] Second, as we noted in Krajewski, "blood samples are the most direct means of measuring alcohol concentration in the blood . . . ." *Id., P40.* However, obtaining a warrant to authorize a blood draw may take some time and may often be impracticable. *Id., P42* **[**382]** *n.19.* n14 Police would be forced to choose between obtaining the most direct and accurate evidence of intoxication and taking the risk this evidence would be destroyed, or procuring the most easily ascertainable evidence of intoxication, knowing that it is often subject to challenge in court. Thus, such a result would impair the legitimate evidence gathering objectives of the police because the level of blood alcohol would continue to dissipate until the person is transported to a hospital and blood is actually drawn. See *id., P38.* Yet, as the United States Supreme Court recognized in Skinner, "the government's interest in dispensing with the warrant requirement is at its strongest

when, as here, 'the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.'" *Skinner, 489 U.S. at 623* (quoting *Camara v. San Francisco Mun. Ct., 387 U.S. 523, 533, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967)).* **[***29]**

n14 Apparently, according to Justice Prosser's dissent, these concerns that we recognized in Krajewski are no longer valid. Justice Prosser's dissent, P59 (quoting *Johnson v. United States, 333 U.S. 10, 14-15, 92 L. Ed. 436, 68 S. Ct. 367 (1948)).* We also note that the length of time required to secure a warrant is important because chemical tests must usually be taken within three hours after arrest in order to be considered prima facie evidence of intoxication. See *Wis. Stat. § 885.235(3).*

[*P30] Ironically, Faust's position might also subject Wisconsin drivers to a greater number of blood tests. Because the police would be required to obtain a warrant to perform a nonconsensual blood test after a driver had consented to a breath test, police departments might routinely make a blood test the first test for which they ask under the implied consent statute so as to be able to gather the most direct evidence of a driver's level of intoxication without fear of the evidence **[***30]** being destroyed. Those stopped for an alcohol-related driving offense would be routinely subject to a blood test as a first test, a procedure far more time-consuming and intrusive than a simple chemical breath test. *Skinner, 489 U.S. at 625-26.*

B. Reasonableness

[*P31] Although we have concluded that the nature of the evidence sought, not the existence of other evidence, determines the exigency, our holding does not mean that the police have carte blanche to take an unlimited number of tests as long as alcohol continues to dissipate from the bloodstream.

We need not today determine the outer boundaries of the exigent circumstances exception to the warrant requirement and draw a bright line in order to answer questions such as whether the police may constitutionally take multiple blood tests or a combination of chemical breath samples, urine tests, and blood tests all without a warrant, for these are not the facts before us. As explained in Krajewski, "exigency relieves the state of the burden of obtaining a warrant before a search. It does not relieve the state of establishing, in a hearing after the search, that it met the requirements for a constitutional **[***31]** search without a warrant, including the requirement of reasonableness." *Krajewski, 2002 WI 97, 255 Wis. 2d 98, P44, 648 N.W.2d 385.* Thus, the mere presence of exigent circumstances is insufficient for a warrantless blood draw to pass constitutional muster; the search must also meet the test for reasonableness that we articulated in Bohling. *Krajewski, 2002 WI 97, 255 Wis. 2d 98, PP45, 63; Bohling, 173 Wis. 2d at 533-34.* n15 Faust concedes **[**383]** that the test here satisfied the requirements set forth in Bohling.

n15 Chief Justice Abrahamson's dissent is just plain wrong when it asserts that Bohling is not applicable in this case. Chief Justice Abrahamson's dissent, P49. As we explained in *Bohling, 173 Wis. 2d at 533-34*, even when exigent circumstances are present based on the rapid dissipation of alcohol from the bloodstream, the search still must be reasonable in order to pass constitutional muster. See also *Krajewski, 2002 WI 97, 255 Wis. 2d 98, P63, 648 N.W.2d 385* ("We reaffirm that the rapid dissipation of alcohol in the bloodstream creates an exigency that justifies a nonconsensual test of the blood, breath, or urine of a person arrested for drunk driving while intoxicated . . . so long as the test is administered pursuant to the factors enumerated in Bohling.") (emphasis added). Thus, *Bohling, 173 Wis. 2d 529* is always applicable when evaluating the

constitutionality of a warrantless blood draw in a drunk driving case.

[***32]

[*P32] As the United States Supreme Court has stated, "the touchstone of the *Fourth Amendment* is reasonableness." *Florida v. Jimeno, 500 U.S. 248, 250, 114 L. Ed. 2d 297, 111 S. Ct. 1801 (1991)*. "Reasonableness" pervades the test we set forth for evaluating the constitutionality of warrantless blood draws in Bohling. *Bohling, 173 Wis. 2d at 533-34*. There may well be circumstances where the police have obtained sufficient evidence of the defendant's level of intoxication that a further test would be unreasonable under the circumstances presented.

[*P33] However, such are not the facts presented today. Here, the police obtained a chemical breath sample, the testing of which indicted that Faust possessed an alcohol concentration of 0.09. As noted supra, while the police were made aware after this test was performed that Faust had incurred two previous alcohol-related driving convictions, they could not know whether one or both of these convictions would ultimately be admitted at trial. If either of them were ultimately determined to be inadmissible, the State would be required to prove that Faust was operating his vehicle with an alcohol concentration [***33] of 0.1 or higher. See *Wis. Stat. § 885.235(1g)(c)*. The preliminary breath test that indicated Faust possessed an alcohol concentration of 0.13 would not have been admissible for this purpose. *Wis. Stat. § 343.303*. Additionally, the police had no way of knowing at the time the test was administered whether the chemical analysis of Faust's breath sample would be useable at trial. Given the strong state interest in removing drunk drivers from Wisconsin's roadways (especially reoffending drunk drivers), Faust's two apparent drunk driving related convictions, and the results of the initial chemical breath test, we cannot say that requiring Faust to submit to a single warrantless blood draw was unreasonable. n16

n16 Thus, we merely determine that under the facts of this case, it was reasonable for police to take one blood test in addition to the single chemical breath test. We do not hold that it is reasonable for the police to "take as many valid tests of the suspect's blood alcohol as they [think] necessary to sustain a conviction." Chief Justice Abrahamson's dissent, P45. To assuage the concern of the dissent, we reiterate that the reasonableness of a warrantless nonconsensual test when a presumptively valid consensual test is present will depend upon the totality of the circumstances of each individual case.

We also point out the internal inconsistencies present in Chief Justice Abrahamson's dissent. On the one hand, it stresses that exigent circumstances are to be determined under a totality of the circumstances test and chastises the majority opinion for supposedly allowing police to take an unlimited number of tests. Chief Justice Abrahamson's dissent, PP43, 45. On the other hand, the dissent bemoans the fact that we do not create a bright line rule establishing how many tests are reasonable. Chief Justice Abrahamson's dissent, P50.

[*34]**

VI. CONCLUSION

[*P34] In sum, we reaffirm that the rapid dissipation of alcohol in the bloodstream of **[**384]** an individual arrested for a drunk driving related offense constitutes an exigency that justifies the warrantless nonconsensual test of that individual's blood, breath, or urine, so long as the test satisfies the four factors enumerated in *Bohling*. The presence of one presumptively valid chemical sample of the defendant's breath does not extinguish the exigent circumstances justifying a warrantless blood draw. The nature of the evidence sought--that is, the rapid dissipation of alcohol from the bloodstream--

not the existence of other evidence, determines the exigency. Because exigent circumstances were present in this case and the blood test satisfied the test we set forth in Bohling, we reverse the decision of the court of appeals.

By the Court.-The decision of the court of appeals is reversed.

DISSENT BY: SHIRLEY S. ABRAHAMSON; DAVID T. PROSSER, JR.

DISSENT:

[*P35] SHIRLEY S. ABRAHAMSON, C.J. (*dissenting*). I agree with the circuit court that the results of the forced blood test should be suppressed. The blood test was taken without consent, without a search warrant **[***35]** and without exigent circumstances.

[*P36] Exigent circumstances did not exist, the circuit court ruled, because the arresting officer had already obtained what he believed to be a voluntary and sufficient breath test that demonstrated that Faust's BAC was in excess of the legal limit. The circuit court postulated that "the problem could have been obviated by [the law enforcement officer] purely requesting blood as the primary test."

[*P37] The circuit court got the case right. It followed this court's decision in *State v. Krajewski, 2002 WI 97, P40, 255 Wis. 2d 98, 648 N.W.2d 385*, cert. denied, *537 U.S. 1089, 154 L. Ed. 2d 634 (2002)*: "The exigency that exists because of dissipating alcohol does not disappear until a satisfactory, useable chemical test has been taken."

[*P38] Law enforcement officers have a choice of which of several chemical tests to administer. As we explained in Krajewski, we must presume that the legislature had good reasons for giving law enforcement officers a choice among chemical tests. Each test has different attributes. n17 Krajewski

made it clear that the choice was the officer's, not the accused's. **[***36]** The chemical test the officer chose in the present case was, according to the officer's own testimony, a satisfactory, useable chemical test.

n17 *State v. Krajewski, 2002 WI 97, P40, 255 Wis. 2d 98, 648 N.W.2d 385*, cert. denied, *537 U.S. 1089, 154 L. Ed. 2d 634 (2002).*

[*P39] Adhering to the Krajewski case decided and published a mere two years ago, I conclude that, without consent, without a search warrant, and without exigent circumstances, the forced blood test in the present case violated the United States Constitution.

[*P40] The *Fourth Amendment* provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated". n18 The crux of the *Fourth Amendment* is reasonableness.

n18 *U.S. Const Amend. IV.*

[*37]**

[*P41] "The United States Supreme Court has consistently held that warrantless searches are per se unreasonable under the *Fourth Amendment*, subject to a few carefully delineated exceptions." n19 The majority relies upon the exigency exception to justify the warrantless search in **[**385]** the present case, and its reasoning is broader than the exception.

n19 *State v. Murdock, 155 Wis. 2d 217, 227, 455 N.W.2d 618 (1990).*

[*P42] The majority erroneously holds that the nature of the evidence alone determines whether exigent circumstances exist. n20 The majority declares without any legal support at all, and contrary to our own Krajewski decision, that "the nature of the evidence sought, not the existence of other evidence, determines the exigency." n21

n20 Majority op., P34.

n21 Majority op., P23.

[*P43] **[***38]** The accepted principle of law is that exigent circumstances are determined by examining the totality of the circumstances. n22 The test for exigent circumstances upon review is whether a police officer under the circumstances known to the officer at the time "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the 'destruction of evidence.'" n23

n22 *State v. Smith, 131 Wis. 2d 220, 229, 388 N.W.2d 601 (1986)*; *State v. Kraimer, 99 Wis. 2d 306, 321, 298 N.W.2d 568 (1980)*; *State v. Mielke, 2002 WI App 251, PP7-10, 257 Wis. 2d 876, 653 N.W.2d 316*; *State v. Garrett, 2001 WI App 240, P16, 248 Wis. 2d 61, 71, 635 N.W.2d 615*.

n23 *State v. Bohling, 173 Wis. 2d 529, 538-9, 494 N.W.2d 399 (1993)* (quoting *Schmerber v. California, 384 U.S. 757, 770-71, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966)*).

[*P44] Evidence of alcohol in **[***39]** the body is destroyed by the passage of time, without any act of the

individual involved or of law enforcement. All evidence of intoxication cannot be gathered and preserved. Here evidence of intoxication has been preserved in the form of the result of a valid breathalyzer test. Evidence of intoxication that is being destroyed in the present case is cumulative of evidence already collected and preserved. The State offered no proof of exigent circumstances except for continuing dissipation of alcohol.

[*P45] The majority's argument is essentially that because law enforcement officers do not know what will happen at trial (and no one does, of course), it was reasonable for them to take as many valid tests of the suspect's blood alcohol as they thought necessary to sustain a conviction. n24 The majority also is concerned that a defendant may exercise his or her constitutional rights and challenge prior convictions or the validity of the results of a chemical test. n25

n24 Majority op., P33.

n25 Id.

[*40]**

[*P46] This court understood and responded to these problems in Krajewski. The Krajewski court held that law enforcement officers may choose to give the chemical test they think appropriate under the circumstances.

[*P47] Furthermore, the legislature apparently enables law enforcement officers to take more than one chemical test by request. Under the implied consent law, if the suspect refuses to submit to a chemical test, the police may take possession of the person's driver's license and prepare a notice of intent to revoke the person's operating privilege. n26 Therefore, the state's **[**386]** interest in keeping drunk drivers off the road appears to be met, even if a warrantless blood draw is prevented by the *Fourth Amendment*.

n26 Wisconsin's implied consent statute states in pertinent part:

> *343.305* Tests for intoxication; administrative suspension and court-ordered
>
> (3) Requested or required.
>
> (a) Upon arrest of a person for violation of s. 346.63(1), (2m) or (5) or a local ordinance in conformity therewith, or for a violation of s. 346.63(2) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified under sub. (2). Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample.
>
> . . . .
>
> (9) Refusals; Notice and Court Hearing.
>
> (a) If a person refuses to take a test under sub. (3)(a), the law enforcement officer shall immediately take possession of the person's license and prepare a notice of intent to revoke, by court order under sub. (10), the person's operating privilege.

[*41]**

[*P48] Although the majority concedes that law enforcement officers do not have carte blanche to take an unlimited number of tests as long as alcohol continues to dissipate in the bloodstream, it refuses to define the outer limits

of how many tests are reasonable. The majority opinion falls back to the reasonableness test, citing the four-part reasonableness test of Bohling. n27

n27 Majority op., P31.

[*P49] *Bohling, 173 Wis2d 529* is not applicable to determine exigent circumstances in the present case when more than one test was administered. The first and second of the four Bohling factors amount to justification for arrest for drunk driving. The third factor relates to the setting under which blood is drawn. The fourth factor relates to exigent circumstances. But, according to the majority opinion, dissipation of alcohol creates exigent circumstances. So no reasonableness test is offered by the majority. The internal inconsistencies in the majority opinion are apparent and troubling.

[*P50] **[***42]** By failing to define the outer limits of what is reasonable in a blood draw case, the majority opinion opens the door to more litigation. The majority opinion also leaves law enforcement officers, litigants, circuit courts, and the court of appeals in a quandary, without guidance regarding what number of tests is reasonable.

[*P51] Because the breathalyzer test was sufficient to preserve evidence of Faust's intoxication until trial, no exigent circumstances existed to take blood without consent or a search warrant. That alcohol naturally dissipates in the blood ordinarily creates an exigent circumstance. It does not, however, create an exigent circumstance under the facts of this case.

[*P52] For the reasons set forth, I dissent.

[*P53] I am authorized to state that Justices ANN WALSH BRADLEY and DAVID T. PROSSER, JR. join this dissent.

[*P54] DAVID T. PROSSER, J. *(dissenting).* The majority opinion is well intentioned. None of the members of the court is unconcerned about the continuing carnage from intoxicated drivers, n28 or the continuing prevalence of impaired driving on Wisconsin roadways. n29 These legitimate concerns underlay our decisions in *State v. Bohling, 173 Wis. 2d 529, 494 N.W.2d 399 (1993),* **[***43]** and *State v. Krajewski, 2002 WI 97, 255 Wis. 2d 98, 648 N.W.2d 385.*

n28 There were 292 people killed and 6,570 people injured as a result of alcohol-related motor vehicle crashes in Wisconsin during the year 2002, according to a report published in February 2004 by the Wisconsin Department of Transportation, Bureau of Transportation Safety (an average of 1 person killed or injured every 77 minutes).

www.dot.wisconsin.gov/safety/motorist/crashfacts/index/htm(last visited June 30, 2004).

n29 There were 37,775 people arrested for operating while intoxicated on Wisconsin roadways in 2002. Id.

[*P55] The problem in this case is that the arresting officer was not satisfied with a voluntary, satisfactory, and useable chemical breath test from the defendant. He **[**387]** wanted a second test as backup. No reason was given for this second "search" of the defendant except the desire to gather additional evidence in the event it was needed. The circuit court later suppressed the product of this **[***44]** second search without a warrant on grounds that "exigent circumstances did not exist to justify the warrantless taking of Defendant's blood."

[*P56] In order to justify a second warrantless taking, we are forced to redefine "exigency" to the point that it becomes meaningless.

I

[*P57] The American Heritage Dictionary of the English Language defines "exigent" as an adjective that means "Requiring immediate action or remedy." The American Heritage Dictionary of the English Language 642 (3d ed. 1992). An "exigency" is defined as a "pressing or urgent situation." Id. "Exigencies are "urgent requirements; pressing needs." Id. It is easy enough to explain a second search for breath, blood, or urine if one focuses narrowly on the fact that alcohol is dissipating in the blood stream at the time the search is undertaken. It is not so easy to justify a second search for backup evidence if one attempts to justify that search as an urgent requirement.

[*P58] "Exigency" first appeared in *Fourth Amendment* jurisprudence in *McDonald v. United States, 335 U.S. 451, 455-56, 93 L. Ed. 153, 69 S. Ct. 191 (1948)*. In that case, the Court suppressed evidence obtained **[***45]** when police intruded into the home of a suspected "numbers" operator. The officers, who had the defendant under surveillance for two months, entered by open window to arrest the suspect because the police heard an adding machine typically used in numbers operations. Justice Douglas, writing for the majority, reflected on the importance of the *Fourth Amendment*:

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the *Fourth Amendment* has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection

> of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional **[***46]** requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

Id. (emphasis added).

[*P59] McDonald followed a line of cases that included *Johnson v. United States, 333 U.S. 10, 92 L. Ed. 436, 68 S. Ct. 367 (1948)*. In Johnson, the Court explained the justification for one of the exceptions to the warrant requirement but it did not use the term "exigency." Instead it used the term "exceptional circumstances." *Id. at 14-15*. The Court addressed the search of a hotel room where, based on the smell of opium in the hallway, officers believed that narcotics activity would be found. The Court held that the officers could have, and therefore should have, obtained a warrant.

> **[**388]** There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the **[***47]** officers and some slight delay necessary to prepare papers and present evidence to a magistrate. There are never very convincing reasons and, in these circumstances, certainly are not enough to bypass the constitutional requirement. No suspect was fleeing or likely to

> take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time would disappear. But they were not capable at any time of being reduced to possession for presentation to court.

Id. at 14-15 (emphasis added).

[*P60] Three years later, in *United States v. Jeffers, 342 U.S. 48, 96 L. Ed. 59, 72 S. Ct. 93 (1951)*, the Court was again presented with a warrantless hotel room search. The defendant in Jeffers attempted to bribe the hotel detective with $ 500 to let the defendant into a room occupied by his two aunts so that the defendant could retrieve something he had "stashed" in the room. The hotel detective asked that the defendant call back later, and in the meantime phoned the police. The police investigated and tried knocking on the hotel room door, and, **[***48]** when nobody answered, the police had an employee let them into the hotel room. After a thorough search, they discovered narcotics in the room's closet. The Court found the search violated the *Fourth Amendment* and suppressed the evidence of the narcotics. The Court reviewed the principles of the *Fourth Amendment* and, in doing so, cited Johnson for the proposition that warrantless searches may be proper in "exceptional circumstances." *Id. at 51*. The Court cited McDonald for the proposition that the Government bears the burden of demonstrating that an exception to the warrant requirement may be justified, id., but the Court did not mention "exigency" in any manner.

[*P61] The landmark decision in *Schmerber v. California, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966)*, is an important link in this line of cases, but it also did not use the terms "exigent" or "exigency." The relevant discussion instead used the term "emergency."

> The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened "the **[***49]** destruction of evidence," *Preston v. United States, 376 U.S. 364, 367, 11 L. Ed. 2d 777, 84 S. Ct. 881.* We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.

Id. at 770-71 (emphasis added).

[*P62] Over the years, the Wisconsin Supreme Court and the United States Supreme Court have characterized Schmerber as representing the "exigent **[**389]** circumstances" exception to the warrant requirement. See *Winston v. Lee, 470 U.S. 753, 759, 84 L. Ed. 2d 662, 105 S. Ct. 1611 (1985)*; *United States v. Dionisio, 410 U.S. 1, 8-9, 35 L. Ed. 2d 67, 93 S. Ct. 764 (1973)*; *State v. Bohling, 173 Wis.2d 529, 538, 494 N.W.2d 399 (1993)*.

II

[*P63] In the present case, the police obtained satisfactory, **[***50]** useable evidence. Nothing threatened the destruction of that evidence. The only thing "threatened" was the destruction of additional evidence of the same character.

[*P64] As a former prosecutor, I repeatedly represented to juries that machines to measure the alcohol content of breath were scientific and reliable. Consequently, it is hard to embrace

the proposition that an "exigency" of constitutional stature exists to obtain backup evidence from samples of blood or urine. If that were correct, it would seem as though an exigency exists in every case in which blood is not drawn. Such an exigency is a built-in rationale for extended detention and additional tests potentially amounting to harassment.

[*P65] If the officer in this case had offered any compelling explanation for why a second test was "needed" as opposed to "desired," I would probably not be writing this dissent. But on the facts presented, I cannot conclude that the second warrantless search of the defendant was entitled to march with other recognized "exigencies" in our law. The result in this case untethers the "exigent circumstances" exception to the warrant requirement from the premises supporting the **[***51]** exception. I join the opinion of the Chief Justice and respectfully dissent.

[*P66] I am authorized to state that Chief Justice SHIRLEY S. ABRAHAMSON and Justice ANN WALSH BRADLEY join this dissent.

State of Wisconsin, Plaintiff-Appellant, v. Jacob J. Faust, Defendant-Respondent.

Appeal No. 03-0952-CR

COURT OF APPEALS OF WISCONSIN, DISTRICT TWO

2003 WI App 243; 267 Wis. 2d 783; 672 N.W.2d 97; 2003 Wisc. App. LEXIS 927

June 16, 2003, Submitted on Briefs
October 1, 2003, Decided
October 1, 2003, Opinion Filed
[ENTERED: October 1, 2003]

SUBSEQUENT HISTORY: Review granted by *State v. Faust, 2004 WI 1, 268 Wis. 2d 133, 673 N.W.2d 691, 2003 Wisc. LEXIS 1049 (2003)*
Reversed by *State v. Faust, 2004 WI 99, 2004 Wisc. LEXIS 474 (2004)*

PRIOR HISTORY: APPEAL from an order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. Cir. Ct. No. 02CT000145.

DISPOSITION: Affirmed.

COUNSEL: On behalf of the plaintiff-appellant, the cause was submitted on the brief of Mary T. Wagner, assistant district attorney.

On behalf of the defendant-respondent, the cause was submitted on the brief of Stephen M. Seymour of Sheboygan.

JUDGES: Before Anderson, P.J., Brown and Nettesheim, JJ. NETTESHEIM, J. (concurring).

OPINION BY: BROWN

OPINION:

[786]** **[***99]** **[*P1]** BROWN, J. The question here is whether exigent circumstances still exist for a nonconsensual and warrantless blood draw even after the State has already obtained a voluntary chemical breath test producing a valid sample. In ***State v. Krajewski***, *2002 WI 97, P1, 255 Wis. 2d 98, 648 N.W.2d 385, cert. denied, 537 U.S. 1089, 154 L. Ed. 2d 634, 123 S. Ct. 704 (2002)*, our supreme court undertook the **[**787]** task of determining the parameters by which law enforcement could conduct a warrantless and nonconsensual blood draw in the context of an arrest for operating a motor vehicle while intoxicated pursuant to the exigent circumstances exception to the Fourth Amendment. Our supreme court instructed that "the exigency that exists because of dissipating alcohol does not disappear until a satisfactory, useable chemical test has been taken." ***Id.***, P40. We are bound by this statement. Accordingly, we hold that once an individual arrested on probable cause for OWI has provided a satisfactory and useable chemical test, the exigent circumstances justifying a warrantless and nonconsensual blood draw no longer exist. We therefore affirm the circuit court's order granting Jacob J. Faust's motion to suppress the results of the blood test.

[*P2] The facts are undisputed. On February 19, 2002, Sheboygan police officer James Olsen conducted a traffic stop in the city of Sheboygan. Prior to the stop, Olsen had observed that the license plate displayed on the car Faust was driving was registered to a 1988 Chevrolet Coupe, but was in fact attached to an Audi Coupe. Upon pulling the vehicle over and identifying the driver of the vehicle as Faust, Olsen noted a strong odor of intoxicants emanating from the vehicle and that

Faust's speech was slurred and his eyes bloodshot and glassy. Olsen asked Faust how much he had to drink before driving and Faust admitted to downing "five brandies." After Faust failed field sobriety tests, Olsen administered a preliminary breath test which returned a result of a .13 g/100 ml blood alcohol content.

[*P3] Olsen then transported Faust to the Sheboygan police department, where he agreed to provide a sample of his breath for chemical analysis. The breath test reflected a blood alcohol content of .09 grams of **[**788]** alcohol per 210 liters of breath, which is .01 above the prohibited alcohol concentration (.08) pertinent to Faust as a third offender pursuant to Wis. Stat. § 885.235(1g)(cd) (2001-02). n1 Although Olsen was aware that Faust was therefore operating with a prohibited blood alcohol level given his two prior convictions, he advised Faust that he would seek a blood test as well. Olsen then read Faust an Informing the Accused form. Faust refused to consent to the blood test, and a forced blood sample was subsequently drawn from him at the hospital. The blood sample ultimately reflected a blood alcohol level of .10 g/100 ml of blood.

n1 All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[*P4] On October 16, 2002, Faust filed a motion to suppress the blood test results, arguing that since the breath test had already established that his blood alcohol exceeded the prohibited legal limit, there was no longer any exigency justifying a blood draw without a warrant. At the first **[***100]** motion hearing, Faust conceded that for the purposes of the hearing he was not challenging that the officer had probable cause to stop or arrest him. After a second motion hearing, the circuit court granted Faust's motion to suppress the blood test

results, reasoning that "exigent circumstances did not exist to justify the warrantless taking of Faust's blood and ... the blood test was taken outside of statutory parameters." This appeal followed.

[*P5] For purposes of this appeal, there are no genuine issues of material fact. We are presented with the question of whether a forced blood draw meets the exigent circumstances exception to the warrant requirement of the Fourth Amendment to the United **[**789]** States Constitution and article I, section 11 of the Wisconsin Constitution when a valid breath test has already been taken. This is a question of law that we review de novo. ***State v. Bohling***, *173 Wis. 2d 529, 533, 494 N.W.2d 399 (1993).*

[*P6] As we stated at the outset, our holding in this case is based upon ***Krajewski***. Nonetheless, to better understand how the analysis conducted in ***Krajewski*** controls the outcome in this case, we will, as did the court in ***Krajewski***, provide some background about the exigency exception to the warrant requirement of the Fourth Amendment and its relationship to Wisconsin's implied consent statute.

[*P7] Both the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution establish the right of persons to be secure from unreasonable searches. Consequently, this court interprets the two constitutional provisions in concert. ***Krajewski***, *2002 WI 97, P18 n.9, 255 Wis. 2d 98, 648 N.W.2d 385.* Searches conducted without a warrant are deemed per se unreasonable unless they fall within one of "a few specifically established and well delineated exceptions." ***Coolidge v. New Hampshire***, *403 U.S. 443, 454-55, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971)*; *see also* ***State v. Murdock***, *155 Wis. 2d 217, 227, 455 N.W.2d 618 (1990).* Two of the carefully delineated exceptions to the warrant requirement are consent searches and searches based on exigent circumstances. *See* ***Schneckloth v. Bustamonte***, *412 U.S. 218, 219, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973)*;

***Schmerber v. California**, 384 U.S. 757, 770-71, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966).* A well-recognized exigent circumstance is the threat that evidence will be lost or destroyed if time is taken to obtain a warrant. ***Bohling**, 173 Wis. 2d at 537-38.*

[790]** **[*P8]** A warrantless blood draw from a person arrested for driving while intoxicated is permissible under the exigent circumstances exception to the Fourth Amendment's warrant requirement. ***Schmerber**, 384 U.S. at 771-72.* The exigency upon which a warrantless blood draw is premised is the dissipation of alcohol in the bloodstream. ***Krajewski**, 2002 WI 97, P37, 255 Wis. 2d 98, 648 N.W.2d 385.* In order for the dissipation of alcohol from an individual's bloodstream to constitute sufficient exigency: (1) the blood draw must be taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime; (2) there must be a clear indication that the blood draw will produce evidence of intoxication; (3) the method used to take the blood sample must be a reasonable one and performed in a reasonable manner; and (4) the arrestee must present no reasonable objection to the blood draw. ***Bohling**, 173 Wis. 2d at 534.*

[*P9] Wisconsin has enacted an implied consent statute for motor vehicle operators, Wis. Stat. § 343.305. A person who operates a motor vehicle in this state is **[***101]** deemed to have given consent to one or more tests of his or her blood, breath, or urine upon the request of a law enforcement officer if the person is arrested for a drunk driving offense. Sec. 343.305(2). Pursuant to § 343.305(3)(a), a law enforcement officer may request that a person arrested for an OWI provide one or more samples of the person's blood, breath, or urine for testing.

[*P10] Here, for the purposes of this appeal, neither party questions that pursuant to Wisconsin's Implied Consent Law, a law enforcement officer, having obtained a voluntary sample of breath, blood, or urine **[**791]** for chemical testing, may

request that the driver give a second, different sample for testing. Rather, the specific issue we address is: if the driver then refuses the officer's request for the second, different sample, whether the warrantless and nonconsensual extraction and testing of the driver's blood for evidence is still legally valid under the exigent circumstances exception to the Fourth Amendment. Stated another way, we decide whether the exigent circumstances justifying a warrantless blood draw are automatically extinguished after a law enforcement officer has already obtained a valid, voluntary breath test. As we mentioned earlier, ***Krajewski*** is the starting point of our analysis of this issue.

[*P11] There, Krajewski was arrested on probable cause for OWI. ***Krajewski***, *2002 WI 97, PP1, 7, 255 Wis. 2d 98, 648 N.W.2d 385*. When asked to submit to a blood test, Krajewski refused, citing a fear of needles. ***Id.***, P9. Krajewski instead offered to provide a breath or urine sample. ***Id.*** Krajewski was then forced to submit to a blood draw. ***Id.***, P12. On appeal, Krajewski acknowledged that the rapid dissipation of alcohol in a person's bloodstream creates an exigency justifying a forcible blood draw when a person refuses to submit to any chemical test, but argued that once the person offers to submit to an alternative chemical test, the exigency disappears and the officer may not proceed with an involuntary test without a search warrant. ***Id.***, P34.

[*P12] Our supreme court rejected this argument and held that a person's agreement to submit to a test of the person's choice does not negate the exigency created by the dissipation of alcohol in the bloodstream, nor does it render unconstitutional a nonconsensual test of the officer's choice. ***Id.***, P63. The court explained that an arrested person's offer to submit to one **[**792]** chemical test rather than another does not slow the dissipation of alcohol. ***Id.***, P37. According to the court, "the evidence remains on a course to be destroyed." ***Id.*** The court reasoned that the arrested person could fail to give a

sufficient breath specimen and/or have a change of heart and refuse altogether to submit to the test. ***Id.***, P38. The court also noted that securing a breath test rather than a blood test may not be satisfactory to law enforcement because an officer may want to determine whether the person is also under the influence of controlled substances and a breath test is not likely to reveal the presence of a controlled substance. ***Id.***, P40. Thus, the court concluded that "the exigency that exists because of dissipating alcohol does not disappear until a satisfactory, useable chemical test has been taken." ***Id.***

[*P13] It is this last statement by the court that the parties ask us to clarify. It is the State's position that the exigency created by the dissipation of alcohol from the bloodstream of a person lawfully arrested for drunk driving does not automatically disappear when a single valid chemical test for intoxication has been performed. The State argues that the exigency justifying a warrantless blood draw following a valid **[***102]** drunk driving arrest is based on the continuous and rapid dissipation of alcohol from the bloodstream, not the presence or absence of other positive test results. This argument flies in the face of our supreme court's clear directive in ***Krajewski***.

[*P14] By its plain language, ***Krajewski*** instructs that once a satisfactory and useable chemical test is taken, the exigency created by the dissipation of alcohol is extinguished. This conclusion is logical given the concerns that prompted the supreme court's holding in **[**793]** that case; namely, that the driver would later refuse to cooperate with authorities in submitting to a breath test and/or fail to give a valid breath specimen and, consequently, precious time, during which the evidence would continue to dissipate, risks being lost. These concerns do not come into play once a satisfactory, useable chemical test has been performed-law enforcement would have already collected the evidence it needs. Unless law enforcement has some basis for believing the first test is unreliable or

unusable, the exigent circumstances permitting law enforcement to conduct a forcible blood draw no longer exist.

[*P15] The State also appears to argue that even if it appeared to police at the time of the arrest that a satisfactory, useable chemical breath test had been administered, the defendant could later successfully attack the breath test at trial and therefore the exigency does not disappear. However, we do not interpret ***Krajewski*** as saying that the determination of whether a chemical test is satisfactory and useable is made at the time of trial. Rather, this determination is to be made at the time the blood alcohol is dissipating in the alleged drunk driver's system-the time at which the Fourth Amendment intrusion is to occur.

[*P16] We are of course bound by the plain language used by the supreme court in ***Krajewski***. *See* ***Cook v. Cook****, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997)* (holding that only the supreme court has the power to overrule, modify or withdraw language from a previous supreme court opinion). Accordingly, we hold that after an individual arrested on probable cause for drunk driving has provided a satisfactory and useable **[**794]** chemical test, the exigent circumstances justifying a warrantless and nonconsensual blood draw no longer exist. n2

n2 In this case, there was no dispute that the breath test was, in the opinion of the officer, valid. It is also undisputed that Faust tested over the limit. We express no opinion as to whether exigent circumstances would remain if the defendant tested under the limit. We will leave it up to a future court to decide whether a result unfavorable to police is, in the words of the ***Krajewski*** court, not "satisfactory" and "useable" such that exigent circumstances remain. *See* ***State v. Krajewski****, 2002 WI 97, P40, 255 Wis. 2d 98, 648 N.W.2d 385, cert. denied, 537 U.S. 1089, 154 L. Ed. 2d 634, 123 S. Ct. 704 (2002).*

> To decide the issue now would be nothing more than dicta because, as we have noted, the breath test result here was over the limit for Faust.

[*P17] In the case at hand, the record contains no evidence that the police were concerned about the breath test being in any way unsatisfactory or unusable. For example, there is no evidence that the equipment was not working properly or that Faust's breath sample was otherwise insufficient. In fact, at the motion hearing, Olsen testified that he believed he had obtained a valid and useable sample of Faust's breath. The intoximeter reading was .09, which established that Faust was operating with a prohibited blood alcohol level, given his two prior convictions, and Olsen testified that he was aware of this. Olsen also acknowledged that he had no reason to believe that Faust was under the influence of some other type of controlled **[***103]** substance and he did not request the blood test for the purpose of detecting the presence of controlled substances. It appears that Faust had consented to and provided a satisfactory and useable chemical breath test as required by ***Krajewski***. We therefore conclude that **[**795]** the trial court correctly determined that exigent circumstances did not exist to justify the warrantless and nonconsensual blood draw and thus properly suppressed the evidence derived therefrom. We affirm.

By the Court.-Order affirmed.

Recommended for publication in the official reports.

CONCURBY: NETTESHEIM

CONCUR:

[*P18] NETTESHEIM, J. (*concurring*). With little confidence, I join the majority opinion. My hesitancy about this case stems not from the majority opinion, but rather from the case on which it is founded- ***State v. Krajewski***, *2002 WI 97,*

255 Wis. 2d 98, 648 N.W.2d 385, cert. denied, 537 U.S. 1089, 154 L. Ed. 2d 634, 123 S. Ct. 704 (2002). In my judgment, ***Krajewski*** is internally inconsistent and sends mixed signals. I join my colleagues in this case only because an isolated passage in ***Krajewski*** mandates an affirmance and I, like the majority, am bound by the pronouncements of our supreme court. *See* ***Cook v. Cook****, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).*

[*P19] The ultimate holding of ***Krajewski*** is that "the warrantless blood draw in this case was properly based on exigency and complied with [the] factors enumerated in ***Bohling***." n3 ***Krajewski****, 2002 WI 97, P3, 255 Wis. 2d 98, 648 N.W.2d 385.* I agree with this holding. I also agree with the logic of ***Krajewski***, which explains in some detail why the exigency of dissipating alcohol persists even in the face of an existing breath test. ***Id.***, PP40-42. Unfortunately, the opinion prefaces this discussion with the following sentence upon which the majority hangs its hat: "the exigency that exists because of dissipating alcohol does not disappear until a satisfactory, useable chemical test has been taken." ***Id.***, P40; Majority at P12.

n3 ***State v. Bohling****, 173 Wis. 2d 529, 494 N.W.2d 399 (1993).*

[*P20] Having made that statement, ***Krajewski*** then embarks on a discussion which seems to contradict it. In the very next sentence, ***Krajewski*** says, "Securing **[**796]** a breath test rather than a blood test may not be satisfactory to law enforcement because an officer may want to determine whether the person is also under the influence of controlled substances." n4 ***Krajewski****, 2002 WI 97, P40, 255 Wis. 2d 98, 648 N.W.2d 385.*

n4 Wisconsin Stat. § 346.63(1) prohibits not only

> operating under the influence of an intoxicant, but also operating under the influence of a controlled substance, a controlled substance analog, or any combination of the three. The statute also prohibits operating under the influence of any other drug that impairs the ability to operate a motor vehicle or any combination of an intoxicant and such drug.

[*P21] But the contradiction does not stop there. In the very next paragraph, ***Krajewski*** states, "Even when a person submits to a breath test in lieu of a blood test-outside the provisions of the implied consent statute-the test may be subject to challenge on grounds that the person's consent to the test was not given freely and voluntarily." ***Id.*** at P41. While Faust's breath test was administered under the auspices of the implied consent law, that law does not guarantee that the requirements of the criminal law governing the free and voluntary giving of consent have otherwise been satisfied. Moreover, the implied consent statute does not restrict the police from using other *constitutional* means to collect evidence of the **[***104]** driver's intoxication. ***State v. Gibson***, *2001 WI App 71, P12, 242 Wis. 2d 267, 626 N.W.2d 73.*

[*P22] In short, my concern is that the police do not have a crystal ball in these situations, a proposition which the ***Krajewski*** decision seems to recognize. While the police here presumably believed that they had obtained a valid breath test, this does not guarantee, in the very words of ***Krajewski***, a *satisfactory and useable* breath test. That determination would depend on a **[**797]** future ruling by the trial court in the event Faust should challenge the breath test. We must bear in mind that this case is before us via the State's appeal from the trial court's order granting Faust's motion to suppress. *See* Wis. Stat. § 974.05(1)(d)2. Thus, this case remains pending in the trial court.

[*P23] This same concern applies to Faust's status as an alleged third-time offender. Faust's breath test produced a result of 0.9 grams of alcohol per 210 liters of breath, which was above the 0.8 level for such an offender, but below the .10 level for a first- or second-time offender. Wis. Stat. § 885.235(1g)(c), (cd). Here again, without a crystal ball, the police had no assurance that some or all of Faust's prior convictions would go unchallenged. Should that occur and should any one of the prior two convictions be unfounded, the State will be required to prove that Faust operated a motor vehicle with a PAC of .10 or more, not 0.8 or more. Both this court and the supreme court have seen a steady stream of challenges (some successful) to alleged prior convictions in criminal cases. *See* ***State v. Saunders****, 2002 WI 107, P1, P54, 255 Wis. 2d 589, 649 N.W.2d 263*; ***State v. Wideman****, 206 Wis. 2d 91, 94, 107-08 n.24, 556 N.W.2d 737 (1996)*; ***State v. Koeppen****, 195 Wis. 2d 117, 121, 130, 536 N.W.2d 386 (Ct. App. 1995)*; ***State v. Theriault****, 187 Wis. 2d 125, 130, 132 n.1, 522 N.W.2d 254 (Ct. App. 1994)*; ***State v. Goldstein****, 182 Wis. 2d 251, 254, 261, 513 N.W.2d 631 (Ct. App. 1994).* n5

n5 The same can be said for the steady stream of challenges that the appellate courts have seen to breathalyzer results. *See, e.g.,* ***City of New Berlin v. Wertz****, 105 Wis. 2d 670, 672, 314 N.W.2d 911 (Ct. App. 1981)* (defendant moved to suppress the breathalyzer test results on the grounds that the testing procedures and methods did not meet certain administrative code requirements); ***State v. Walstad****, 119 Wis. 2d 483, 504, 351 N.W.2d 469 (1984)* (defendant challenged the breathalyzer result before trial court based on whether a used breathalyzer test ampoule is retestable); ***State v. Busch****, 217 Wis. 2d 429, 436, 576 N.W.2d 904 (1998)* (defendant moved to suppress on grounds that modified version of intoxilyzer machine had not been evaluated

> and approved for use by the chief of the chemical test section); ***State v. Dwinell***, *119 Wis. 2d 305, 308, 349 N.W.2d 739 (Ct. App. 1984)* (defendants challenged the admission of breathalyzer test results on grounds that the intoxilyzer machine, the Intoximeter 3000, was an unreliable and inaccurate measuring device); ***State v. Burkman***, *96 Wis. 2d 630, 634, 292 N.W.2d 641 (1980)* (the trial court excluded breathalyzer results because the officer failed to comply with administrative procedures requiring that the subject be kept under continuous observation for at least twenty minutes prior to the collection of the breath specimen). In addition, this court has addressed the admissibility of breathalyzer test results in a steady stream of single judge appeals.

[798]** **[*P24]** The supreme court's isolated statement in ***Krajewski***, upon which the majority opinion rests, appears to hold that the exigency of an OWI suspect's dissipating alcohol level is eliminated because a blood test would merely provide corroborating evidence of the breath test. n6 I have examined the law of exigent circumstances and **[***105]** can find no case law or other commentary that has made this statement. To the contrary, in ***State v. Bohling***, *173 Wis. 2d 529, 494 N.W.2d 399 (1993)*, where our supreme court first approved the forcible taking of an OWI suspect's blood draw, the court said:

> We hold that the dissipation of alcohol from a person's bloodstream constitutes a sufficient exigency to justify a warrantless blood draw under the following circumstances: (1) the blood draw is taken at the direction of **[**799]** a law enforcement officer from a person lawfully arrested for a drunk-driving related violation or crime, and (2) there is a clear indication that the blood draw will produce evidence of intoxication.

Id. at 547-48. Here, all of the factors contemplated by ***Bohling*** were present. The dissipation of alcohol existed as a matter of law. The blood draw was taken at the direction of a law enforcement officer. Finally, there was clear evidence that a blood draw would produce evidence of intoxication. If I were writing on a clean slate, I would hold that the exigency of Faust's dissipating blood alcohol level was not eliminated simply because the police had already obtained a breath test result.

> n6 Of course, if the breath test should be suppressed, the blood test would not be corroborating evidence. Instead, it would be the only evidence of a PAC violation. The same is true if any of Faust's prior convictions should be struck.

[*P25] Appellate courts sometimes criticize the police for failing to conduct a thorough investigation. *See* ***State v. Kieffer****, 217 Wis. 2d 531, 550-51, 577 N.W.2d 352 (1998).* Here, we criticize the police for being too thorough. I dislike the result in this case. But given the supreme court's utterance in ***Krajewski***, I see no choice but to affirm. I reluctantly concur.

WISCONSIN STATUTES

PROVISIONS COMMON TO ACTIONS AND PROCEEDINGS IN ALL COURTS
CHAPTER 885. WITNESSES AND ORAL TESTIMONY
SUBCHAPTER I GENERAL PROVISIONS

Wis. Stat. § 885.235 (2002)

885.235. Chemical tests for intoxication.

(1) In this section:

(a) "Alcohol concentration" means the number of grams of alcohol in 100 milliliters of a persons blood or the number of grams of alcohol in 210 liters of a persons breath.

(b) "Controlled substance" has the meaning specified in s. 961.01 (4)

(bd) "Controlled substance analog" has the meaning given in s. 961.01 (4m)

(c) "Drug" has the meaning specified in s. 450.01 (10)

(1g) In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration while operating or driving a motor vehicle or, if the vehicle is a commercial motor vehicle, on duty time, while operating a motorboat, except a sailboat operating under sail alone, while operating a snowmobile, while operating an all-terrain vehicle or while handling a firearm, evidence of the amount of alcohol in the persons blood at the time in question, as shown by chemical analysis of a sample of the persons blood or urine or evidence of the amount of alcohol in the persons breath, is admissible on the issue of whether he or she was

under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration if the sample was taken within 3 hours after the event to be proved. The chemical analysis shall be given effect as follows without requiring any expert testimony as to its effect:

(a)

1. The fact that the analysis shows that the person had an alcohol concentration of more than 0.0 but less than 0.08 is relevant evidence on the issue of being under the combined influence of alcohol and a controlled substance, a controlled substance analog or any other drug, but, except as provided in par. (d) or sub. (1m), is not to be given any prima facie effect.

2. The fact that the analysis shows that the person had an alcohol concentration of more than 0.0 but less than 0.1 is relevant evidence on the issue of being under the combined influence of alcohol and a controlled substance, a controlled substance analog or any other drug but, except as provided in par. (d) or sub. (1m), is not to be given any prima facie effect.

(b) Except with respect to the operation of a commercial motor vehicle as provided in par. (d), the fact that the analysis shows that the person had an alcohol concentration of more than 0.04 but less than 0.1 is relevant evidence on the issue of intoxication or an alcohol concentration of 0.1 or more but is not to be given any prima facie effect.

(bd) Except with respect to the operation of a commercial motor vehicle as provided in par. (d), the fact that the analysis shows that the person had an alcohol concentration of more than 0.04 but less than 0.08 is relevant evidence on the issue of intoxication or an alcohol concentration of 0.08 or more, but is not to be given any prima facie effect.

(c) The fact that the analysis shows that the person had an alcohol concentration of 0.1 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol

concentration of 0.1 or more.

(cd) In cases involving persons who have 2 or more prior convictions, suspensions or revocations, as counted under s. 343.307 (1), the fact that the analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.08 or more.

(d) The fact that the analysis shows that the person had an alcohol concentration of 0.04 or more is prima facie evidence that he or she was under the influence of an intoxicant with respect to operation of a commercial motor vehicle and is prima facie evidence that he or she had an alcohol concentration of 0.04 or more.

(1m) In any action under s. 23.33 (4c) (a) 3., 30.681 (1) (bn), 346.63 (2m) or (7) or 350.101 (1) (c), evidence of the amount of alcohol in the persons blood at the time in question, as shown by chemical analysis of a sample of the persons blood or urine or evidence of the amount of alcohol in the persons breath, is admissible on the issue of whether he or she had an alcohol concentration in the range specified in s. 23.33 (4c) (a) 3., 30.681 (1) (bn), 346.63 (2m) or 350.101 (1) (c) or an alcohol concentration above 0.0 under s. 346.63 (7) if the sample was taken within 3 hours after the event to be proved. The fact that the analysis shows that the person had an alcohol concentration of more than 0.0 but not more than 0.1 is prima facie evidence that the person had an alcohol concentration in the range specified in s. 23.33 (4c) (a) 3., 30.681 (1) (bn), 346.63 (2m) or 350.101 (1) (c) or an alcohol concentration above 0.0 under s. 346.63 (7)

(2) The concentration of alcohol in the blood shall be taken prima facie to be three-fourths of the concentration of alcohol in the urine.

(3) If the sample of breath, blood or urine was not taken

within 3 hours after the event to be proved, evidence of the amount of alcohol in the persons blood or breath as shown by the chemical analysis is admissible only if expert testimony establishes its probative value and may be given prima facie effect only if the effect is established by expert testimony.

(4) The provisions of this section relating to the admissibility of chemical tests for alcohol concentration or intoxication shall not be construed as limiting the introduction of any other competent evidence bearing on the question of whether or not a person was under the influence of an intoxicant, had a specified alcohol concentration or had an alcohol concentration in the range specified in s. 23.33 (4c) (a) 3., 30.681 (1) (bn), 346.63 (2m) or 350.101 (1) (c).

(2)

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No. 04-471

In The

Supreme Court of the United States

JACOB J. FAUST,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the exigent circumstances exception to the Fourth Amendment's warrant requirement allow a police officer to perform a nonconsensual blood draw from a person arrested for driving while intoxicated when the officer has already performed a test of that person's breath?

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, the State of Wisconsin, files this brief opposing Petitioner Jacob J. Faust's petition for a writ of certiorari to review the opinion of the Wisconsin Supreme Court in *State v. Faust*, 2004 WI 99, 274 Wis. 2d 183, 682 N.W.2d 371; Pet-Ap. 1a-35a. Respondent files this brief in opposition pursuant to this Court's request on November 16, 2004, that Respondent file such a brief.

JURISDICTION

Respondent disagrees with Petitioner's contention that this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The decision of the Wisconsin Supreme Court does not reflect a final judgment within the meaning of that statute. Respondent will address this argument further in the "Reasons for Denying the Petition" section of this brief.

STATEMENT OF THE CASE

The facts relevant to Faust's claim are undisputed. Faust was stopped in Sheboygan, Wisconsin, after City of Sheboygan Police Officer James Olsen noticed the license plate on his car was registered to a different vehicle. *Faust*, 682 N.W.2d 371, ¶ 4; Pet-Ap. at 3a. Olsen smelled a strong odor of intoxicants in Faust's vehicle and also noticed that Faust's eyes were bloodshot and glassy and that he was slurring his speech. Faust told Olsen that he had drank "five brandies." *Id.*

Faust failed a field sobriety test and submitted to a preliminary breath test, which indicated a blood alcohol level of 0.13. *Id.* at ¶ 5; Pet-Ap. at 3a-4a. Olsen arrested Faust and transported him to the police station. There, Faust voluntarily gave a breath sample for chemical analysis, the results of which indicated that Faust's blood alcohol level was 0.09. *Id.* Because Faust had two prior convictions for operating while intoxicated, he was prohibited from operating a motor vehicle with a blood alcohol concentration greater than 0.08. *Id.*; Wis. Stat. § 885.235(1g)(cd) (2001-02).

Desiring to obtain additional evidence because the previous tests were close to the legal limit, Olsen requested

that Faust submit to a blood test. *Id.* at ¶ 6; Pet-Ap. at 4a-5a. Faust refused. Olsen then took Faust to a hospital where a blood test was performed. The results of this test indicated that Faust's blood alcohol level was 0.1. *Id.*

The State charged Faust with operating while intoxicated and operating with a prohibited blood alcohol concentration. *Id.* at ¶ 7; Pet-Ap. at 5a; Wis. Stat. § 346.63(1)(a) and (b) (2001-02). Faust moved to suppress the results of the blood test. He claimed that the test violated the Fourth Amendment because it was taken without a warrant. Specifically, he argued that the exigent circumstances exception to the warrant requirement, which normally allows police officers to test the blood alcohol levels of persons arrested for drunk driving without a warrant, did not apply to the blood test because any exigency that would have justified the blood draw ended when Olsen obtained the breath test. *Faust*, 682 N.W.2d 371, ¶ 7; Pet-Ap. at 5a. The circuit court agreed and suppressed the results of the blood test. *Id.*

The State appealed the court's suppression order. The Wisconsin Court of Appeals affirmed the circuit court, based upon a Wisconsin Supreme Court case, *State v. Krajewski*, 2002 WI 97, 255 Wis. 2d 98, 648 N.W.2d 385. *See State v. Faust*, 2003 WI App 243, ¶¶ 14-16, 267 Wis. 2d 783, 672 N.W.2d 97; Pet-Ap. at 42a-43a.

The Wisconsin Supreme Court granted the State's petition for review and reversed. *Faust*, 682 N.W.2d 371, ¶ 3; Pet-Ap. 2a-3a. It concluded that the exigent circumstances exception applied to the blood draw because of the rapid dissipation of alcohol in the bloodstream, and rejected Faust's claim that the exigency ended simply because Olsen had obtained a valid breath test. *Id.* at ¶¶ 22-23; Pet-Ap. at 12a-13a. The court's conclusion was based

primarily on Wisconsin case law interpreting this Court's decision in *Schmerber v. California*, 384 U.S. 757 (1966). *Faust*, 682 N.W.2d 371, ¶¶ 16-18; Pet-Ap. at 9a-11a. The court concluded that the nature of the evidence in this case, alcohol, and the fact that it rapidly dissipates from the bloodstream, presented the exigent circumstances necessary to conduct the test without a warrant, and the existence of other evidence did not end the exigency. *Id.* at ¶ 22; Pet-Ap. at 12a-13a.

The court also noted that concerns about the later usability of the test were consistent with its finding of exigent circumstances. *Id.* at ¶ 24; Pet-Ap. 14a-15a. In particular, the court said that breath tests are often challenged as inaccurate. *Id.* at ¶ 25; Pet-Ap. at 15a. Additionally, the court said police often need additional, more definite evidence when the test results place the defendant close to the legal limit, as they did here. *Id.* at ¶ 26; Pet-Ap. 15a-16a. The court also noted that defendants often later challenge their consent to chemical tests, even though consent was apparently given. *Id.* at ¶ 27; Pet-Ap. at 16a-16b. The court's discussion of these issues was tied to its finding of exigent circumstances, not, as Faust suggests, a series of "what if" scenarios. (Petition at 7-8).

Finally, based primarily on Faust's concession, the court also concluded that the blood draw was reasonable. *Faust*, 682 N.W.2d 371, ¶ 31; Pet-Ap. at 20a-22a. The court stated that merely because it had concluded that exigent circumstances obviated the need to obtain a warrant in this case, it was not holding that police would be justified in taking any number of tests as long as there was alcohol in the suspect's blood. *Id.* The court did not define what it would consider unreasonable, *see id.* at ¶¶ 32-33; Pet-Ap. at 22a-23a, but concluded, based upon Faust's concession and the

particular facts of the case, that Olsen's blood draw was reasonable. *Id.* at ¶¶ 31-33; Pet-Ap. 20a-23a.

REASONS FOR DENYING THE PETITION

I. CERTIORARI IS NOT WARRANTED BECAUSE THE DECISION OF THE WISCONSIN SUPREME COURT IS NOT FINAL WITHIN THE MEANING OF 28 U.S.C. § 1257(a).

A. Faust has not yet been tried for the two drunk driving charges against him and it is not clear what role the blood test's results will play in future proceedings.

As Faust briefly mentions in his petition, he has not been tried on the charges against him, one count each of operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited blood alcohol concentration. (Petition at 3). *See* Wis. Stat. § 346.62(1)(a) and (b) (2001-02). The Wisconsin Supreme Court's decision arose from an appeal by the State challenging the circuit court's decision to suppress the results of the blood sample taken from Faust. *See* Wis. Stat. § 974.05(1)(d)2. (2001-02); *Faust*, 682 N.W.2d 371, ¶ 7; Pet-Ap. at 5a.

Under 28 U.S.C. § 1257(a), certiorari review of a state court decision is available only for "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." In a criminal proceeding, "finality generally is defined by a judgment of conviction and the imposition of a sentence." *Florida v. Thomas*, 532 U.S. 774

(2001) (citing *Fort Wayne Books v. Indiana*, 489 U.S. 46, 54 (1989)). There has not yet been a trial, or any other proceedings involving the charges against Faust, and this Court should not accept his petition for certiorari.

At this point, it is entirely unclear what effect the Wisconsin Supreme Court's decision, or any decision by this Court, will have on Faust's prosecution. The arresting officer took two samples from Faust, one of his breath and the other of his blood. *Faust*, 682 N.W.2d 381, ¶¶ 5-6; Pet-Ap. at 3a-5a. While the results were different, both placed Faust over the legal limit at which he was allowed to operate because of his two prior operating while intoxicated convictions. *Id.* at ¶ 5; Pet-Ap. at 3a-4a. *See* Wis. Stat. § 885.235(1g)(cd). Either or both of these tests could be used as evidence against Faust. Without knowing what role the blood test results will play in any future proceedings, any resolution of the question presented at this point may wind up being largely academic.

In its decision, the Wisconsin Supreme Court noted that Faust could challenge the validity of one or both of his prior convictions, thus requiring the State to prove that his blood alcohol level was above .10, rather than .08. *Id.* at ¶ 26; Pet-Ap. at 15a-16a. The court also said that Faust could, and had indicated that he likely would, challenge the accuracy of the breath test and might also challenge his consent to that test. *Id.* at ¶¶ 25, 27; Pet-Ap. 15a-17a. While, under these scenarios, the blood test would become more relevant, the fact is that neither has happened yet. It is speculative to suggest that these challenges will occur, or more importantly, that they will succeed. As such, it is impossible to gauge what effect, if any, a decision by this Court would have on the outcome of the charges against Faust. This Court should deny his petition for certiorari

because the Wisconsin Supreme Court's decision is not a final judgment under 28 U.S.C. § 1257(a).

B. Faust's case does not meet any of the exceptions to the final judgment rule.

This Court has recognized four types of cases that may be excepted from the final judgment rule. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). None of these apply to Faust's case. The first category includes cases in which "there are further proceedings–even entire trials–yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Id.* at 479. As noted, it is entirely unclear what will occur in this case's future state court proceedings. Further, the federal issue presented, whether the blood draw violated the Fourth Amendment, is not conclusive to the outcome of the future state proceedings because, even if the results were suppressed, Faust could still be prosecuted based upon the breath test.

The second category of excepted cases are those in which "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. This exception does not apply. Again, it is far from clear what role the results of the blood test will have in the subsequent state court proceedings. Further, it may be that Faust will not be convicted. As such, it is not at all clear that the federal issue would remain regardless of the outcome of the state proceedings.

Third, *Cox* exempts cases where "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review

of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. Here, if Faust is convicted at trial, he could still later seek review of his claim. *See Johnson v. California*, 541 U.S. ___, 124 S. Ct 1833, 1834 (2004). His case does not meet this exception.

The last *Cox* exception includes those cases where:

> [T]he federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Cox, 420 U.S. at 482-83.

This exception plainly does not apply to Faust. If this Court were to reverse the Wisconsin Supreme Court, it would not preclude Faust's prosecution because of the existence of the breath test. Instead, the Court's resolution of the federal issue presented here would only control the admissibility of some evidence against Faust. *See id.*

Faust's case does not meet any of this Court's recognized exceptions to the 28 U.S.C. § 1257(a) finality requirement, and this Court should deny the petition for certiorari.

II. CERTIORARI IS NOT WARRANTED BECAUSE THE WISCONSIN SUPREME COURT'S DECISION DOES NOT CONFLICT WITH *NELSON v. CITY OF IRVINE*.

The centerpiece of Faust's certiorari petition is the purported conflict between the Wisconsin Supreme Court's decision and the Ninth Circuit's decision in *Nelson v. City of Irvine*, 143 F.3d 1196 (9th Cir. 1998), *cert. denied,* 525 U.S. 981 (1998). (Petition at 11-15). Sup. Ct. R. 10(b). Faust points to some language in *Nelson* suggesting that the Ninth Circuit and Wisconsin take drastically different approaches to the exigent circumstances exception to the warrant requirement in the context of nonconsensual blood tests of drunk driving arrestees and this Court's decision in *Schmerber*. (Petition at 11-15). As such, Faust claims that this Court must grant certiorari to resolve this dispute.

Faust overstates the conflict. First, the purported conflicting language in *Nelson* is dicta. It is not essential to the court's holding, and presents no meaningful conflict with the Wisconsin Supreme Court's decision. Second, the alleged improper police conduct in *Nelson* is factually different from that in *Faust* because none of the claims in *Nelson* involved the subsequent administration of a chemical test after one had already been obtained. Finally, the procedural postures in *Faust* and *Nelson*, which was a proposed 42 U.S.C. § 1983 class action, are entirely different. There is no reason for this Court to grant certiorari based upon *Faust's* alleged conflict with *Nelson*.

A. Relevant facts about *Nelson*.

Nelson involved an appeal of a proposed class action § 1983 suit that had been dismissed on its pleadings. *Nelson*, 143 F.3d at 1199. The proposed class members were all persons convicted of drunk driving who were generally not informed of their right, under California's implied consent law, to take their choice of a blood, breath, or urine test upon their arrest. *Id.* The class members claimed that their rights under the Fourth Amendment had been violated because "they were coerced into submitting to blood tests in order to determine their blood alcohol level, and deprived of the statutorily mandated option to take a breath or urine test instead." *Id.*

The Ninth Circuit agreed that the proposed class representatives had alleged violations of their Fourth Amendment rights. *Id.* at 1205. Accepting the plaintiffs' allegations as true, the court first concluded, after a lengthy discussion, that it was unreasonable for the officers to force the arrestees to submit to blood tests when urine and breath tests were available and required to be offered by state statute. *Id.* at 1200-04. It also briefly addressed the exigent circumstances exception the warrant requirement. *Id.* at 1204-05.

It is *Nelson's* short discussion of exigent circumstances that Faust relies upon to establish his claimed conflict. In particular, he maintains that the Wisconsin Supreme Court's decision that the exigent circumstances exception is based upon the rapid dissipation of alcohol from the blood and that the exigency does not end when a valid test is taken conflicts with *Nelson*'s statement that:

> When an arrestee requests but is denied the choice of an available breath or urine test, the

> exigency used to justify the warrantless blood test continues only because of the City's failure to perform the requested alternative test. Whenever a DUI arrestee consents to a breath or urine test, and such tests are available, the administration of either the breath or urine test would preserve the evidence and end the exigency. In such cases, because the sole justification advanced to excuse the officers from obtaining a warrant disappeared when the exigency ended, the blood tests were not only unnecessary and unreasonable, but violated the Fourth Amendment's warrant requirement.

Id. at 1205 (footnote omitted).

B. Faust's alleged conflict relies entirely on dicta from *Nelson*.

Faust's claim of conflict between the Wisconsin Supreme Court's decision and the Ninth Circuit's is premised entirely on dicta in the *Nelson* decision. *Faust* and *Nelson* each focus on different aspects of the Fourth Amendment inquiry into warrantless blood draws from drunk driving arrestees: exigent circumstances and reasonableness. Each decision focuses on one almost to the exclusion of the other. That *Nelson's* discussion of exigent circumstances is dicta is further demonstrated by the fact that, assuming that *Nelson* stands for the proposition that Faust claims it does, the court's statements would not apply to any of the proposed class representatives' claims. *Nelson's* exigent circumstances discussion is dicta and does not conflict with *Faust*.

1. *Faust* focuses on exigent circumstances while *Nelson* almost exclusively addresses reasonableness.

As noted in *Faust* and *Nelson*, in order to comply with the Fourth Amendment, police officers drawing blood without a warrant must find an exception to the warrant requirement, and their ensuing search must also be reasonable. *Faust*, 682 N.W.2d 371, ¶ 31; Pet-Ap. at 20a-22a; *Nelson*, 143 F.3d at 1200. While both decisions address these two issues, they each focus on a different one. *Nelson*'s discussion of exigent circumstances is an afterthought following a lengthy discussion of reasonableness. *Nelson*, 143 F.3d at 1200-05. In contrast, *Faust* focuses entirely on exigent circumstances, primarily because Faust conceded the blood draw's reasonableness under the test established in *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399, 400, *cert. denied,* 510 U.S. 836 (1993); *Faust*, 682 N.W.2d 371, ¶¶ 10-31; Pet-Ap. at 7a-22a.

In addition to its extremely brief treatment of the issue, the Ninth Circuit's discussion of exigency is not necessary to its conclusion that the blood draws alleged violated the Fourth Amendment. Exigent circumstances only excuse the need for a warrant; any search subsequently performed must still be reasonable. Had the officers in *Nelson* obtained warrants, it would not have affected the court's conclusion that the blood draws were unreasonable based upon the availability of other tests that the officers were statutorily required to offer. Reasonableness, not exigent circumstances, is the focus and the holding of the *Nelson* decision.

In contrast, the *Faust* decision primarily addresses exigent circumstances. Faust conceded that the blood draw was reasonable under the Fourth Amendment. *Faust*, 682 N.W.2d 371, ¶ 31; Pet-Ap. at 20a-21a. Thus, the only issue presented in *Faust* was whether the arresting officer needed to obtain a warrant, or find another exception to the warrant rule, to perform the blood draw. *Nelson*'s primary discussion, and the only one necessary to sustain its holding, is that it was unreasonable to take a blood test from an arrestee when other tests were available and had to be offered. *Faust* and *Nelson* focus on two different Fourth Amendment inquiries and do not present a conflict that this Court should resolve.

2. *Nelson*'s exigent circumstances discussion would not apply to any of the plaintiffs in that case.

The exigent circumstances discussion in *Nelson* is also dicta because it is far from clear how the discussion, as Faust interprets it, would even apply to the facts presented in that case. Faust argues that *Nelson* stands for the proposition that once a valid chemical test is taken, the exigency ends and bars any subsequent warrantless search. (Petition at 12). If this is the holding, however, it would not apply to any of *Nelson's* proposed class members' allegations, and is therefore not essential to the Ninth Circuit's decision.

It does not appear that any of the proposed class representatives in *Nelson* ever had to submit to a valid chemical test other than the blood test they claimed violated their Fourth Amendment rights. According to the descriptions provided in *Nelson*, one class member took an inadmissible preliminary breath test and another failed in an

attempt to take a breath test. *Nelson*, 143 F.3d at 1199. The others appear to have only been given one test, their blood draw. *Id.* If the exigent circumstances discussion in *Nelson* is to stand for the proposition that a valid test of any kind ends the exigent circumstances excusing the need to obtain a warrant, then the exigency in the cases of the various class representatives ended when their blood was taken and these tests were all supported by exigent circumstances. *Nelson's* discussion of exigent circumstances is dicta. The conflict between *Faust* and *Nelson* is not genuine, and this Court should not grant certiorari.

C. *Nelson* does not present the same factual circumstances as *Faust* because, in *Nelson*, the police generally only administered one chemical test.

Similarly, this Court should deny Faust's request for certiorari because *Faust* and *Nelson* present entirely different factual scenarios. Faust took two chemical tests. He claims that the exigent circumstances that would have allowed his warrantless blood draw no longer existed because he had previously consented to a breath test. None of the proposed class representatives in *Nelson* appear to have made a similar claim, and it is unlikely they could have because, as noted, none of them completed two valid tests. Due to this distinction, the exigent circumstances discussion in *Nelson* is inapplicable to the facts presented in that case, as already noted.

However, another possible interpretation of the Ninth Circuit's exigency discussion, and really the only way to interpret it as applying to that case, is to read it as stating that an arrestee's mere offer to take an alternative test ends the

exigent circumstances. Some of the class representatives might have been able to prove a Fourth Amendment violation based upon this interpretation because some of them claimed they offered to take breath or urine tests. *See Nelson*, 143 F.3d at 1203 n.3.

If *Nelson*'s exigent circumstances discussion is interpreted in this way, however, it does not directly conflict with *Faust*, which only rejected a claim that the exigency ended when a valid test was taken, not when the offer to take an alternative test is made. This would undoubtedly be a much narrower rule that would not directly conflict with the one Faust proposed the Wisconsin Supreme Court adopt and which he now urges is correct to this Court. The only way to view *Nelson*'s discussion of exigent circumstances as anything but dicta is to read out the conflict Faust maintains exists with the Wisconsin Supreme Court's decision.

D. *Faust* and *Nelson* present entirely different procedural scenarios.

Finally, Faust's attempt to show a conflict between his case and *Nelson* must fail because they each involve entirely different types of cases at different stages of litigation. *Faust* arose from an actual criminal drunk driving prosecution. The facts at issue in the lower courts were undisputed. While the Wisconsin Supreme Court's decision was based upon a state's appeal conducted before the case was final, the court nonetheless applied the law to an undisputed and concrete set of facts.

In contrast, *Nelson* involved a class action 42 U.S.C. § 1983 lawsuit that had been dismissed on the pleadings. The Ninth Circuit was addressing facts that it had to presume to be true. There is no indication that these facts were ever

proven or how the legal principles enunciated in *Nelson* were applied on remand to the district court. The different procedural postures of *Nelson* and *Faust* preclude the finding of a conflict allowing this Court to grant certiorari.

Additionally, it is far from clear that *Nelson* has had any impact on how blood or other chemical tests for drunk driving arrestees are administered in California or any other jurisdiction. Further, Respondent has uncovered no case law from that state or any other adopting *Nelson* in a factual situation similar to the one presented here. Any conflict between the principles in *Faust* and *Nelson* may be just that, a conflict in principles. There is no indication that it reflects a real conflict justifying certiorari.

III. CERTIORARI IS NOT WARRANTED BECAUSE THE *FAUST* DECISION DOES NOT CONFLICT WITH ANY OTHER SUPREME COURT DECISIONS.

Finally, Faust argues that the Wisconsin Supreme Court's decision conflicts with several of this Court's cases addressing the exigent circumstances doctrine. (Petition at 17-18). He maintains that *Faust* expands the doctrine far beyond the permissible boundaries of this Court's decisions. Faust is incorrect. Almost all the cases he relies upon address other Fourth Amendment issues and do not directly conflict with *Faust*. To the extent that the cases are on point, Faust has failed to make any showing that the cases conflict in such a way to warrant this Court's review.

Faust first points to *Cupp v. Murphy*, 412 U.S. 291 (1973). His reliance on this case, however, is entirely misplaced. In *Cupp*, as Faust correctly notes, this Court determined that the police taking scrapings from a

defendant's fingernails without a warrant was permissible under the Fourth Amendment. *Id.* at 295-96. The exception to the warrant requirement upon which this Court sustained the search, however, was not exigent circumstances, but rather search incident to arrest. *Id.* *Cupp* involves an entirely different exception to the warrant requirement, and *Faust* does not conflict with it.

Next, Faust points to *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967). (Petition at 17-18). There, police who were following a suspected robber, entered a home to look for him. *Id.* at 297. Although the police apparently obtained the occupant's consent, *see id.* at 297-98, this Court determined that exigent circumstances justified the entry into the house, in part, because of threat to safety that might develop by taking the time to obtain a warrant. *Id.* at 298. Faust compares the concern for public safety in *Hayden* to similar safety concerns involving drunk driving. (Petition at 17). He does not, however, explain why this Court's decision in *Hayden* conflicts with *Faust*, nor can the Respondent discern any such conflict.

Nor has Faust shown any conflict between this Court's decision in *Ker v. California*, 374 U.S. 23 (1963), and the Wisconsin Supreme Court's decision. (Petition at 18). In *Ker*, police entered a home without a warrant to arrest two persons suspected of having marijuana. *Id.* at 28. The issue there, as framed by this Court, was whether the marijuana was lawfully seized incident to the persons' arrest. *Id.* at 34-35. Although the court briefly mentioned that there was an exigency for the police to enter the home based on the possible destruction of the evidence, the focus of the court's decision was whether the marijuana was admissible under a different exception to the warrant requirement, search incident to arrest. *Ker* does not conflict with *Faust.*

United States v. Santana, 427 U.S. 38 (1976), is similarly inapplicable. (Petition at 18). There, the court considered whether a defendant could "thwart an otherwise proper arrest" by entering her home. *Id.* at 42. The court concluded that the "hot pursuit" doctrine allowed the police to follow the suspect into her home and make the arrest. *Id.* at 42-43. Again, while the court addressed the possible destruction of evidence as a basis for justifying the warrantless entry, the court's decision was based on the hot pursuit exception to the requirement for a warrant to arrest a person in their home. *Id.* The court did not address the exigent circumstances exception to the search warrant requirement, and *Santana* does not conflict with *Faust*.

Finally, Faust points to *Welsh v. Wisconsin*, 466 U.S. 740 (1984), as conflicting with the Wisconsin Supreme Court's opinion. (Petition at 18). There, this Court determined that exigent circumstances did not justify the warrantless entry into a suspected drunk driver's home to arrest him. *Welsh*, 466 U.S. at 753. Faust argues that, had this Court wanted to "extend *Schmerber* to treat all drunk driving cases as exigency cases, it could have done so" in *Welsh*. (Petition at 18). However, like *Santana*, this case is inapposite because it involves warrantless entry into a home to arrest, not warrantless blood draws of suspected drunk drivers.

Additionally, Faust is wrong when he claims that applying *Faust's* rationale would have allowed the police in *Welsh* to enter the home and take a blood sample from the defendant. Under both *Bohling* and *Schmerber*, the person whose blood is drawn must first be validly arrested. *See Schmerber*, 384 U.S. at 768-70; *Bohling*, 494 N.W.2d at 400. The issue in *Welsh* was the validity of the arrest, not a blood draw. Because the defendant in *Welsh* had not been properly

arrested, the police could not have taken a warrantless blood sample from him.

In arguing that the Wisconsin Supreme Court's opinion conflicts with the aforementioned cases, Faust maintains that the court greatly expanded the exigent circumstances doctrine so that, in Wisconsin, "all searches of blood [are] exigencies." (Petition at 17). This is incorrect. The Wisconsin Supreme Court properly applied this Court's ruling in *Schmerber* to conclude that the rapid dissipation of alcohol in the bloodstream obviated the need to obtain a warrant to perform the blood draw from Faust. Faust has not demonstrated that the Wisconsin Supreme Court's decision is incongruent with *Schmerber*.

Similarly, this Court should not grant certiorari on the grounds that Wisconsin Supreme Court's decision presents an important federal question that this Court needs to address. (Petition at 15-17). Sup. Ct. R. 10(c). The court did not, as Faust maintains, give police "unfettered discretion to conduct an infinite number of searches based upon the mere assertion that they believe the nature of the evidence sought constitutes an exigency." (Petition at 15). Instead, the court properly recognized that, under *Schmerber*, the police are not required to obtain a warrant to perform chemical testing of drunk driving arrestees due to the rapid dissipation of alcohol from their blood streams. *Faust*, 682 N.W.2d 371, ¶ 12; Pet-Ap. at 7a-8a (citing *Schmerber*, 384 U.S. at 770). As the court also noted, any such test must also be reasonable; and it is hardly obvious, as Faust suggests, that 20 such tests would meet this requirement under the court's decision. (Petition at 16). The Wisconsin Supreme Court's decision is a proper application of *Schmerber*, and there is no need for this Court to accept review.

Faust's doomsday scenarios really concern the reasonableness of the warrantless tests, not the circumstances that obviate the need for a warrant. Faust, however, conceded that his test was reasonable in the state court, and he should not be allowed to raise the issue here. It remains to be seen under what circumstances multiple chemical tests would be unreasonable. This however, is a subject for future litigation and need not be resolved by this Court at this time.

CONCLUSION

Based upon the foregoing reasons, Respondent respectfully requests that this court deny Faust's petition for a writ of certiorari.

Respectfully submitted,

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